No. 00-1089-CFX Title: Toyota Motor Manufacturing, Kentucky, Inc., Petitioner
v.
Ella Williams

Docketed:
January 5, 2001 Court: United States Court of Appeals for the Sixth Circuit

Entry	Date	Proceedings and Orders
	Jan 5 2001	Petition for writ of certiorari filed. (Response due March 5, 2001)
	Jan 29 2001	Order extending time to file response to petition until March 5, 2001.
	Mar 2 2001	Brief of respondent Ella Williams in opposition filed.
	Mar 5 2001	Motion of National Association of Manufacturers for leave to file a brief as amicus curiae filed.
	Mar 14 2001	DISTRIBUTED for Conference of March 30, 2001
	Mar 19 2001	Reply brief of petitioner Toyota Motor Manufacturing, Kentucky, Inc. filed.
	Mar 20 2001	Opposition of respondent to motion of National Association of Manufacturers for leave to file a brief as amicus curiae filed.
	Apr 9 2001	REDISTRIBUTED for Conference of April 13, 2001
	Apr 16 2001	Motion of National Association of Manufacturers for leave to file a brief as amicus curiae GRANTED.
	Apr 16 2001	Petition GRANTED. SET FOR ARGUMENT November 7, 2001. **********
	May 18 2001	Order extending time to file the joint appendix and petitioner's brief on the merits to and including June 29, 2001.
	Jun 4 2001	Record filed.
	Jun 7 2001	Record filed.
	Jun 28 2001	Brief amici curiae of Equal Employment Advisory Council, et al. filed.
	Jun 29 2001	Joint appendix filed.
	Jun 29 2001	Brief of petitioner Toyota Motor Manufacturing, Kentucky, Inc. filed.
	Jun 29 2001	Brief amicus curiae of United States filed.
	Jun 29 2001	Brief amicus curiae of Levi Strauss & Co. filed.
	Jun 29 2001	Brief amici curiae of American Trucking Association, Inc., et al. filed.
	Jul 10 2001	Order extending time to file respondent's brief on the merits to and including August 31, 2001.
	Aug 14 2001	CIRCULATED.
	Aug 31 2001	Brief amici curiae of Judge David L. Bazelon Center for Mental Health Law, et al. filed.
	Aug 31 2001	Brief amicus curiae of National Council on Disability filed.
	Aug 31 2001	Brief amicus curiae of Association of Trial Lawyers of America filed.
	Aug 31 2001	Brief of respondent Ella Williams filed.
	Aug 31 2001	Brief amici curiae of American Federation of Labor, et al. filed.
	Aug 31 2001	Brief amicus curiae of National Employment Lawyers

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Entry	Date	Proceedings and Orders
		Association filed.
	Sep 13 2001	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
	Sep 24 2001	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument DISTRIBUTED.
	Sep 28 2001	Reply brief of petitioner Toyota Motor Manufacturing, Kentucky, Inc. filed.
	Oct 1 2001	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
	Nov 7 2001	ARGUED.

Supreme Court, U.S.
FILED

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No. 00-

IN THE

Supreme Court of the United States

TOYOTA MOTOR MANUFACTURING, KENTUCKY, INC.,

Petitioner,

v.

ELLA WILLIAMS,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Sixth Circuit correctly held—in conflict with the established rule in other circuits—that an impairment precluding an individual from performing only a limited number of tasks associated with a specific job qualifies as a disability under the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.*

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

Petitioner Toyota Motor Manufacturing, Kentucky, Inc. was defendant in the District Court and appellee before the United States Court of Appeals for the Sixth Circuit. Pursuant to S. Ct. Rule 29.6, petitioner notes that it is wholly owned by Toyota Motor Manufacturing North America, Inc., which is in turn wholly owned by Toyota Motor, North America, Inc., which is in turn wholly owned by Toyota Motor Corporation.

Respondent Ella Williams was plaintiff before the District Court and appellant before the United States Court of Appeals for the Sixth Circuit.

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Statistical Abstract of the United States (119th ed. 1999) 23

U.S. Dep't of Labor, Bureau of Labor Statistics, Report of Nonfatal Occupational Injuries (2000) <http://stats.bls.gov/oshC_D98htm> 23

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TOYOTA MOTOR MANUFACTURING,
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Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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PETITION FOR A WRIT OF CERTIORARI

Toyota Motor Manufacturing, Kentucky, Inc. ("TMMK") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the Sixth Circuit reversing the District Court's grant of summary judgment is reported at 224 F.3d 840 and reprinted in the appendix hereto ("App.") at 1a. That opinion amended and superseded a previous opinion, reprinted at App. 12a. The opinion of the District Court granting TMMK's motion for summary judgment is not reported and is reprinted at App. 23a.

JURISDICTION

The initial judgment of the Sixth Circuit, entered on July 10, 2000, was withdrawn and an amended judgment entered on August 29, 2000. App. 1a. A timely petition for rehearing and rehearing *en banc* was denied on October 12, 2000. App. 57a. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Section 3(2)(A) of the Americans with Disabilities Act of 1990 ("ADA"), Pub. L. No. 101-336, 104 Stat. 327, 329-330, 42 U.S.C. § 12102(2)(A), provides, in pertinent part: "The term 'disability' means, with respect to an individual * * * a physical or mental impairment that substantially limits one or more of the major life activities of such individual."

Section 1630.2(i), of Title 29, Code of Federal Regulations, provides: "Major Life Activities means functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."

Section 1630.2(j)(1)(i), (ii) of Title 29, Code of Federal Regulations, provides, in pertinent part: "The term substantially limits means: Unable to perform a major life activity * * * or [s]ignificantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity."

INTRODUCTION

This case concerns the reach of the ADA to individuals whose impairments preclude them from performing only a narrow category of tasks associated with their specific jobs. The ADA by its terms covers only those who have a "disability"—defined as an "impairment that substantially limits one or more of the major life activities." 42 U.S.C. §

12102(2)(A). As both Congress and this Court have emphasized, the statute does not encompass "[p]ersons with minor, trivial impairments," S. Rep. No. 101-116, at 23 (1989), but instead "concerns itself only with limitations that are *in fact* substantial" and that "significantly restrict" the ability to perform a major life activity. *Albertson's, Inc.* v. *Kirkingburg*, 527 U.S. 555, 565 (1999) (emphasis added); *see* 29 C.F.R. § 1630.2(j)(1)(ii).

Ella Williams, the respondent in this case, could perform the manual tasks required by several assembly-line positions at TMMK, but due to carpal tunnel syndrome and tendinitis was unable to perform one particular job that "require[d] the gripping of tools and arms to be kept overhead or at shoulder level repetitively for an extended period of time." App. 6a. A divided panel of the Court of Appeals below held that even though Williams could perform a broad range of manual tasks at both work and home, she was "disabled" under the ADA because "her impairment substantially limits her ability to perform the range of manual tasks associated with *an* assembly line job." *Id.* 4a (emphasis added). That ruling directly conflicts with decisions from other circuits on the scope of the ADA. Those courts have consistently held that a partial limitation that affects only a narrow range of jobs does not—in the language of the ADA—"substantially limit[] one or more of the major life activities." 42 U.S.C. § 12102(2)(A).

The majority opinion below also conflicts with recent precedents from this Court emphasizing that "only impairments causing 'substantial limitations' in individuals' ability to perform major life activities constitute disabilities." *Kirkingburg*, 527 U.S. at 565 (brackets omitted). As Judge Boggs pointed out in dissent below, the panel's opinion "mistakenly takes what is here primarily a *subset* of abilities related to working, the ability to 'perform manual tasks,' and erroneously treats a partial limitation there as substantially limiting a major life activity." App. 11a (emphasis in

original). This Court should grant certiorari to resolve the multiple conflicts on the important and recurring question presented.

STATEMENT OF THE CASE

Located in Georgetown, Kentucky, TMMK employs more than 7,500 individuals, many of whom work on assembly lines that produce Toyota automobiles sold in the United States and abroad. Respondent Ella Williams joined TMMK in 1990, and soon began work on an assembly line that fabricated engines. Within months, however, she developed bilateral carpal tunnel syndrome ("CTS") in her wrists and bilateral tendinitis in her neck and arms, each affliction apparently the product of having had to grip vibrating pneumatic tools to perform her job.[1]

In an effort to accommodate Williams, TMMK assigned her to Quality Control Inspection Operations ("QCIO"), a unit of the assembly line known for having "the 'easiest jobs' at TMMK." App. 25a. Although most employees within QCIO were typically expected to be able to work at any of four stations during a given shift, Williams rotated each week between two of the least physically taxing QCIO positions. In the first of these, she visually inspected painted cars as they moved slowly along a conveyor, searching for imperfections that might have occurred during the assembly or paint process. For a while, that job also required Williams to open and shut the doors, trunk, and hood of each passing car. Demanding slightly more physical exertion, the second QCIO position required Williams to use both arms to wipe down each painted car as it progressed along the conveyor.

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[1] CTS "is caused by compression of the median nerve as it passes through the wrist between flexor tendons and the transverse carpal ligament. This area is called the carpal tunnel." 3 Robert K. Ausman & Dean E. Snyder, *Ausman & Snyder's Medical Library* § 4:18, at 53 (1989).

Throughout her approximately three-year tenure with QCIO, "[i]t is undisputed that Williams was physically capable of performing these jobs and that her actual performance was satisfactory." *Id.* 26a.

Eventually, TMMK determined that every QCIO employee should be trained and capable of working at all four QCIO jobs. Among the two that Williams had yet to work was another paint-inspection position. This one, however, required her to "grip a block of wood with a sponge attached to the end and wipe down the passing cars with a highlight oil at the rate of approximately one car per minute." *Id.* 2a. Beyond the need to grip a tool, the job also differed from Williams's previous positions in that she had to work at regular intervals with her hands and arms at shoulder height. *Id.*

Despite completing without difficulty a week-long training regimen for this position, Williams allegedly began to experience pain in her arms, hands, shoulders, and neck after several weeks at the new job. By her own account, Williams concluded that she was physically incapable of performing the duties that this new position demanded. She did not, however, consider herself unable to perform all assembly-line work. In fact, Williams herself suggested that TMMK return her to her previous two positions, both of which she "always maintained that she could perform without difficulty." *Id.* 27a. Due to her on-going difficulties, however, Williams eventually refused to show up for work. TMMK, in turn, deemed her to have voluntarily resigned her employment and terminated her.

Williams subsequently brought suit under the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 *et seq.*, claiming that TMMK had failed to offer her a reasonable accommodation. TMMK moved for summary judgment on the ground that Williams's ailments did not constitute a "disability" under the ADA. *See id.* § 12102(2). Although

Williams maintained that her impairment affected such major life activities as performing manual tasks and working,[2] TMMK argued that an inability to perform only a narrow subset of assembly-line duties—while remaining perfectly capable of executing a host of manual tasks, including the very assembly-line work Williams had performed the previous three years—did not "substantially limit[] one or more of the major life activities." *Id.* § 12102(2)(A).

The District Court granted TMMK's motion for summary judgment. With respect to the major life activity of performing manual tasks, the court agreed with TMMK that Williams's claim was "irretrievably contradicted by [her] continual insistence that she could perform the tasks in assembly and paint inspection without difficulty; positions requiring manual tasks." App. 36a. Turning to the major life activity of working, the court found dispositive the well-established principle that to be considered substantially limited in that major life activity, an ADA plaintiff "must show more than an inability to perform a single job or the job of her choice." *Id.* 37a (citing *Skorup* v. *Modern Door Corp.*, 153 F.3d 512, 515 (7th Cir. 1998); *Gilday* v. *Mecosta County*, 124 F.3d 760, 767 (6th Cir. 1997)).[3]

Williams appealed, and a divided panel of the Sixth Circuit reversed. App. 1a. In reaching its decision, the panel purported to resolve only the question whether "Williams is

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[2] Williams suggested that her impairment also limited the major life activities of "housework," "gardening," and "playing with her children." App. 34a-35a. The District Court rejected these claims, *id.* 35a-36a, and Williams did not press them on appeal.

[3] Williams also maintained that TMMK violated the ADA and the Family and Medical Leave Act, 29 U.S.C. § 2601 *et seq.*, by discontinuing her employment when she refused to return to work. On both claims, the Court of Appeals affirmed the District Court's grant of summary judgment in favor of TMMK. App. 6a-8a.

substantially limited in performing manual tasks." *Id.* 5a. Nevertheless, the panel began its analysis with *Sutton* v. *United Air Lines, Inc.*, 527 U.S. 471 (1999), where this Court held that to be substantially limited in the major life activity of working, an "individual [must] be unable to perform a class or broad range of jobs." App. 3a-4a. Based on *Sutton*, the panel reasoned that "[i]t would appear * * * that in order to be disabled the plaintiff must show that her manual disability involves a 'class' of manual activities affecting the ability to perform tasks *at work*." *Id.* 4a (emphasis added).

The panel acknowledged that to be disabled under *Sutton*'s class-based framework "'[o]ne must be precluded from more than one type of job.'" *Id.* (quoting *Sutton*, 527 U.S. at 492). It nevertheless determined—without citation to any authority—that with respect to the major life activity of performing manual tasks, the "notion of 'class' advocated by the *Sutton* Court can be based on a more limited concept than 'working,' and can be based on limits on manual activities which can *affect* other major life activities." *Id.* 6a (emphasis added).

The upshot of the panel's opinion was that Williams could demonstrate a *substantial limitation* on her ability to perform manual tasks by simply showing that her impairment "affected" her ability to work—even if the impairment did not otherwise substantially limit her in the major life activity of working. According to the panel, it was irrelevant that Williams remained perfectly capable of accomplishing any number of manual tasks outside of the narrow subset of assembly-line duties that gave her difficulty. *Id.* 4a. It was enough simply that "her impairment substantially limit[ed] her ability to perform the range of manual tasks associated with an assembly line job." *Id.*; *see id.* 5a ("she suffer[ed] from a severe impairment * * * that seriously reduce[d] her ability to perform the manual tasks that are job-related"). And even though Williams, by her own admission, remained capable of manually wiping down cars as she had done for

the previous three years, the panel nonetheless considered her disabled because she could not perform the narrow category of "manual activities that * * * require the gripping of tools and arms to be kept overhead or at shoulder level repetitively for an extended period of time." *Id.* 6a.

Judge Boggs dissented. He observed that under "decisions of this and other courts, [Williams's] inability to perform certain types of tasks would not likely constitute being disabled with regard to the major life activity of working" since an "inability to perform a single, particular job does not constitute a substantial limitation on working." *Id.* 9a. Yet "the opinion today mistakenly takes what is here primarily a *subset* of abilities related to working, the ability to 'perform manual tasks,' and erroneously treats a partial limitation there as substantially limiting a major life activity." *Id.* 11a (emphasis in original).

Allowing a plaintiff to defeat summary judgment by merely "'show[ing] that her manual disability involves a class of manual activities affecting the ability to perform tasks at work * * * conflates (and erodes) the standards for demonstrating a substantial limitation on 'working' and on 'performing manual tasks.' " *Id.* "These are separate inquiries," *id.*, and Williams failed both. She plainly did not demonstrate a substantial limitation on working because her impairment foreclosed her from performing only a "single, particular job." *Id.* Nor did she establish a substantial limitation with respect to manual tasks, for "her limitation is mostly confined to a subset of job-specific tasks." *Id.*; *see id.* 9a-10a ("as the court's opinion again correctly notes, Williams's difficulty is almost exclusively with the inability to do manual tasks that 'require the gripping of tools and repetitive work with hands and arms extended at or above shoulder levels for extended periods of time' "). Indeed, "the record evidence shows that Williams can perform many manual tasks, beginning, most obviously, with the wiping

task [at TMMK] that she already had been doing prior to her newest assignment." *Id.* 9a.

Judge Boggs also found it telling that there are "no citations in the court's opinion, either to regulations or to cases, indicating that such a specific and partial limitation is considered a disability." *Id.* 10a. The reason: the vast majority of federal courts have concluded that such job-specific restrictions do *not* substantially limit the major life activities of performing manual tasks, taking care of oneself, or, of course, working. *Id.* Based on these cases, Judge Boggs concluded that "[m]easuring Williams's limitation against plaintiffs claiming similar limitations on other major life activities, she does not appear disabled." *Id.*

TMMK filed a timely petition for rehearing and rehearing *en banc*, which was denied on October 12, 2000. *Id.* 57a.

REASONS FOR GRANTING THE WRIT

I. THE COURTS OF APPEALS ARE DIVIDED ON THE IMPORTANT AND RECURRING QUESTION WHETHER AN ISOLATED INJURY PRECLUDING AN INDIVIDUAL FROM ONE PARTICULAR JOB CONSTITUTES A DISABILITY UNDER THE ADA

The Sixth Circuit's decision in this case generates a split among the circuits on an important issue that federal courts regularly face: whether an impairment qualifies as a disability under the ADA if it precludes an individual from performing only a limited subset of tasks associated with her specific job. The rule that the Sixth Circuit articulated in this case is that an impairment that merely "*affect[s]* manual tasks associated with working" constitutes a disability under the statute. App. 6a (emphasis added). Other circuits, however, have steadfastly refused to expand the scope of ADA protection to employees afflicted with an isolated injury that prevents them from performing a narrow subset of job-related functions. This Court should grant certiorari to

resolve this conflict between the decision below and recent decisions from the other courts of appeals. *See* S. Ct. Rule 10(a); *Braxton* v. *United States*, 500 U.S. 344, 347 (1991) (a "principal purpose for which we use our certiorari jurisdiction * * * is to resolve conflicts among the United States courts of appeals").

To begin with, the decision below directly conflicts with decisions of other circuits expressly holding that a plaintiff is not substantially limited in the major life activity of performing manual tasks simply because she cannot execute a narrow group of job-specific functions. *See, e.g., Chanda* v. *Engelhard/ICC*, ___ F.3d ___, 2000 WL 1772682, at *3 (11th Cir. Dec. 4, 2000) ("We are persuaded that a plaintiff must demonstrate that he is substantially limited in a *range* of manual tasks rather than a *narrow category* thereof.") (emphasis added); *Hilburn* v. *Murata Elecs. N. Am., Inc.*, 181 F.3d 1220, 1228 (11th Cir. 1999) (plaintiff's inability to perform certain job functions did not substantially limit her in the major life activity of performing manual tasks where she could "walk and run, sit and stand, sleep and eat, bathe, dress, write with a pencil and pen, work around the house, cook, and work") (internal quotations omitted); *Snow* v. *Ridgeview Med. Ctr.*, 128 F.3d 1201, 1207 (8th Cir. 1997) ("Snow's assertion that her ability to perform manual tasks and work is so impaired that it constitutes a disability is unconvincing where there is no evidence that she is thereby precluded from performing a class or broad range of jobs as compared to average persons in the general population.").

The rule that the Sixth Circuit adopted below would have dictated entirely different results in *Chanda*, *Hilburn*, and *Snow*. In *Snow*, the plaintiff—a laboratory and radiological technician—suffered an injury to her neck and spine that prevented her from lifting more than twenty-five pounds, lifting patients, and pushing heavy equipment. No longer able to perform the tasks associated with a full-time laboratory technician, the plaintiff was terminated. She brought

suit under the ADA claiming that her injury affected her in the major life activity of performing manual tasks.

Unlike the Sixth Circuit below, the Eighth Circuit in *Snow* began its analysis with the language of the statute and the interpretive guidelines promulgated by the Equal Employment Opportunity Commission ("EEOC"). The court observed that

> [t]o 'substantially limit' a major life activity means to render an individual *unable* to perform a basic function that the average person in the general population can perform, or to *significantly restrict* the condition, manner, or duration under which an individual can perform a particular major life activity as compared to an average person in the general population. [128 F.3d at 1206 (citing 29 C.F.R. § 1630.2(j)(1)(i), (ii)) (emphasis added).]

Because an impairment must, at the very least, "significantly restrict" an individual's ability to perform a major life activity to constitute a disability under the ADA, the Eighth Circuit reasoned that "[i]t is not enough that an impairment *affect* a major life activity." *Id.* at 1207 (emphasis added). Accordingly, the court concluded that the plaintiff's "assertion that her ability to perform manual tasks and work is so impaired that it constitutes a disability is unconvincing where there is no evidence that she is thereby precluded from performing a class or broad range of jobs as compared to average persons in the general population." *Id.*

The divided panel's decision in the case below is in direct conflict with the holding in *Snow*. Instead of hewing to the plain regulatory language defining "substantially limited," the Sixth Circuit's decision substitutes "affect" for "significantly restrict." Thus, contrary to the rule that the Eighth Circuit articulated in *Snow*, an ADA plaintiff in the Sixth Circuit can now establish a disability by doing no more than showing that her impairments "affect manual tasks associated

with working." App. 6a. *Compare id. with Snow*, 128 F.3d at 1207 ("It is not enough that an impairment affect a major life activity."). Indeed, had that diluted standard governed the proceedings in *Snow*, the plaintiff there certainly would have survived summary judgment: her inability to lift patients and move machinery obviously affected the manual tasks associated with working as a laboratory technician, and ultimately led to her termination.

The decision below is also at odds with the Eleventh Circuit's decision in *Hilburn*. The plaintiff in that case argued that her coronary disease "caused her to have a decreased tolerance for * * * performing essential manual tasks," though by her own admission it precluded her from performing only those jobs requiring her to lift objects. *Hilburn*, 181 F.3d at 1222-23. As did the Eighth Circuit in *Snow*—but unlike the court below—the Eleventh Circuit measured the plaintiff's putative disability against the plain language of the statutory and regulatory text. Recognizing that "a physical impairment alone is not necessarily a disability under the ADA," *id.* at 1226, the court emphasized that the touchstone is proof that an individual is either entirely "[u]nable to perform * * * or [s]ignificantly restricted" in performing a major life activity as compared to the average person in the general population. *Id.* (quoting 29 C.F.R. § 1630.2(j)(1)(i)-(ii)).

As the phrase would suggest, to be "significantly restricted" in performing manual tasks requires much more than a simple inability to accomplish a narrow category of tasks associated with a particular job. In *Hilburn*, therefore, the court rejected the plaintiff's claim of disability because she remained perfectly capable of, among other things, walking, running, standing, bathing, dressing, writing, and cooking. *Hilburn*, 181 F.3d at 1228. Her purported inability to lift objects notwithstanding, the Eleventh Circuit considered it fatal to the plaintiff's claim that she did not "identify,

specifically or by class, any of the manual tasks that she is unable to perform." *Id.*

In stark contrast, the Sixth Circuit below found Williams to be disabled based on nothing more than an inability to perform one exceptionally narrow mode of tactile functions relating to one specialized assembly-line job: "manual activities that * * * require the gripping of tools and arms to be kept overhead or at shoulder level repetitively for an extended period of time." App. 6a. Indeed, Williams was not even foreclosed from all repetitive functions employing her hands and arms, or all assembly-line positions; the three years she spent on an assembly line wiping down freshly painted cars proves as much. *Cf. DePaoli* v. *Abbott Labs.*, 140 F.3d 668, 673 (7th Cir. 1998) (finding individual substantially limited in the major life activity of working where she became "disabled from performing virtually any employment that required repetitive motions of her right hand"). But more importantly, like the plaintiff in *Hilburn*, Williams remained perfectly capable of performing a great number of manual tasks with no more difficulty than the "average person in the general population." 29 C.F.R. § 1630.2(j)(1)(ii). *See* App. 9a ("the record shows that she can perform the manual tasks of brushing her teeth, laundering her clothes, and doing some driving").

Underscoring this conflict among the circuits, the Eleventh Circuit just recently declined to follow the very decision of the Sixth Circuit below. *See Chanda*, ___ F.3d ___, 2000 WL 1772682, at *4. In *Chanda*, the plaintiff had developed tendinitis in his right hand from routinely cutting foamboard during the course of his employment. That repetitive-motion injury left him unable to use his right hand to type, use a computer, write, grasp, or lift.

In rejecting the plaintiff's disability claim, the Eleventh Circuit held—in direct conflict with the decision below—that "a plaintiff must demonstrate that he is substantially limited

in a *range* of manual tasks rather than a *narrow category* thereof." *Id.* at *3 (emphasis added). The court observed that "Chanda's only restrictions that were severe, of lengthy duration, and with a long term impact were related to a narrow category of tasks, such as typing or cutting foamboard for an extensive period of time." *Id.* Despite those difficulties—job-related though they may be—he remained capable of "perform[ing] daily activities, including dressing himself, driving, and attending classes or working in a position requiring computer usage." *Id.* Accordingly, the court concluded that his impairment "falls short of substantially limiting the major life activity of performing manual tasks." *Id.*

Although purporting only to distinguish the Sixth Circuit's decision—citing the case-by-case nature of ADA claims—the Eleventh Circuit quite clearly articulated a rationale that directly conflicts with the decision below. For unlike the Eleventh Circuit, the divided panel in this case thought it unnecessary for an ADA plaintiff to "demonstrate that he is substantially limited in a range of manual tasks." *Id.* Indeed, Williams, like the plaintiff in *Chanda*, had no problem "perform[ing] a range of isolated, non-repetitive manual tasks * * * such as tending to her personal hygiene or carrying out personal or household chores." App. 4a; *see id.* 9a (Boggs, J., dissenting) ("Williams can perform many manual tasks, beginning, most obviously, with the wiping task that she already had been doing prior to her newest assignment."). Instead, the court below found Williams to be disabled simply because her impairment hampered her ability to perform a narrow range of manual tasks that "require the gripping of tools and repetitive work with hands and arms extended at or above shoulder levels for extended periods of time." App. 4a. Elevating such a partial impairment to the status of disability squarely conflicts with the Eleventh Circuit's rule that a disability cannot be based on "restrictions that * * * relate[] to a narrow category of tasks." *Chanda*, 2000 WL 1772682, at *3.

The Sixth Circuit's novel approach to the major life activity of performing manual tasks also conflicts with decisions from the courts of appeals addressing the major life activity of working. Every circuit—including the Sixth—has held that "[t]he inability to perform in a single, particular job does not constitute a substantial limitation in the major life activity of working." *Colwell* v. *Suffolk County Police Dep't*, 158 F.3d 635, 643 (2d Cir. 1998) (quoting 29 C.F.R. § 1630.2(j)(3)(i)), *cert. denied*, 526 U.S. 1018 (1999); *accord Santiago Clemente* v. *Executive Airlines, Inc.*, 213 F.3d 25, 32 (1st Cir. 2000); *Olson* v. *General Elec. Astrospace*, 101 F.3d 947, 952 (3d Cir. 1996); *Halperin* v. *Abacus Tech. Corp.*, 128 F.3d 191, 199 (4th Cir. 1997); *Dutcher* v. *Ingalls Shipbuilding*, 53 F.3d 723, 727 (5th Cir. 1995); *McKay* v. *Toyota Motor Mfg., U.S.A., Inc.*, 110 F.3d 369, 373 (6th Cir. 1997); *Skorup* v. *Modern Door Corp.*, 153 F.3d at 515; *Gutridge* v. *Clure*, 153 F.3d 898, 901 (8th Cir. 1998), *cert. denied*, 526 U.S. 1115 (1999); *Broussard* v. *University of Cal.*, 192 F.3d 1252, 1256-1257 (9th Cir. 1999); *Bolton* v. *Scrivner, Inc.*, 36 F.3d 939, 942-943 (10th Cir. 1994), *cert. denied*, 513 U.S. 1152 (1995); *Standard* v. *A.B.E.L. Servs., Inc.*, 161 F.3d 1318, 1327 (11th Cir. 1998); *Duncan* v. *Washington Metro. Area Transit Auth.*, 201 F.3d 482, 486 (D.C. Cir.), *vacated pending rehearing en banc*, 2000 WL 360095, at *1 (D.C. Cir., Mar. 31, 2000).

The panel's decision below effectively renders this restriction on the ADA's scope a dead letter, and at the same time legitimates claims of disability that the federal courts have heretofore rejected. That is because, under the Sixth Circuit's rule, an ADA plaintiff is deemed "substantially limited" in the major life activity of performing manual tasks if she can simply demonstrate that her impairment "affect[s] manual tasks *associated with working*." App. 6a (emphasis added). Therefore, a plaintiff in the Sixth Circuit, whose

injuries foreclose her from only one particular type of job and who would otherwise not be considered substantially limited in the major life activity of working, can now simply recast her impairment as a substantial limitation on the major life activity of performing manual tasks. By doing so, it is no longer fatal to her disability claim that she is precluded from only one particular job. Quite the opposite is true; for, under the panel's decision, an inability to work a single job "affects" the major life activity of working—even if it does not substantially limit it.

The Sixth Circuit's decision therefore creates a significant split in the circuits over a recurring issue of great national importance. As a practical matter, work-related impairments of similar scope will be treated dissimilarly under the ADA. The Seventh Circuit's decision in *Skorup* is a perfect example. Like Williams, the plaintiff in *Skorup* was transferred to a new position at work that, due to a preexisting case of tendinitis, became too painful to perform. Also like Williams, the plaintiff's impairment was limited in scope, affecting only those "jobs that require a repetitive pulling motion of the shoulder." *Skorup*, 153 F.3d at 513.

The Seventh Circuit concluded that the plaintiff's impairment did not substantially limit her in the major life activity of working. Writing for the court, Judge Kanne explained that "[t]he [ADA] is not a general protection of medically afflicted persons." *Id.* at 514 (quoting *Christian* v. *St. Anthony Med. Ctr., Inc.*, 117 F.3d 1051, 1053 (7th Cir.), *cert. denied*, 523 U.S. 1022 (1998)). Accordingly, "'an inability to perform a particular job for a particular employer' is not sufficient to establish a substantial limitation on the ability to work; rather, 'the impairment must substantially limit employment generally.' " *Id.* (quoting *Weiler* v. *Household Fin. Corp.*, 101 F.3d 519, 524 (7th Cir. 1996)). Although the plaintiff claimed that "she cannot perform any and all jobs which require repetitive stretching and pulling of the shoulder, she provide[d] no evidence of the number of jobs from

which she [was] precluded because of this impairment." *Id.* at 515. Under the Sixth Circuit decision below, however, the *Skorup* plaintiff's inability to perform a job requiring repetitive stretching and pulling of the shoulder would have been deemed a disability since it "affect[ed] manual tasks associated with working." App. 6a.

Similarly, in *Gutridge*, the plaintiff developed carpal and cubital tunnel syndromes in both wrists. *See Gutridge*, 153 F.3d at 900. That injury left him unable to perform his on-site computer-technician position, which required him to transport and carry equipment between jobs. Nevertheless, the Eighth Circuit held that the plaintiff's impairment did not substantially limit him in the major life activity of working. *Id.* "Substantially limits," the court observed, "means 'significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes." *Id.* (quoting 29 C.F.R. § 1630.2(j)(3)(i)). Although the plaintiff could not perform his previous job, he was "still able * * * to function as a computer repair technician for other employers who either do not require lifting as part of their job duties or can provide assistance." *Id.* at 901. That case would have come out the other way under the divided panel's decision below. Again, by simply recasting the ADA claim in terms of performing manual tasks, the plaintiff would have been considered disabled because his carpal tunnel syndrome obviously affected his ability to "perform the manual tasks that are job-related." App. 5a.

The Sixth Circuit decision below is also at odds with the Fifth Circuit's decision in *Dutcher*. The plaintiff there, a welder by trade, claimed that an injury to her right arm substantially limited her in the major life activity of working. *See Dutcher*, 53 F.3d at 724-725. Just as Williams in the case below could perform some assembly-line jobs but not others requiring particular muscle movements, the plaintiff in *Dutcher* was precluded only from welding jobs requiring her to climb great heights to reach her work.

Writing for a unanimous panel, Chief Judge Politz emphasized that "the inability to perform one aspect of a job while retaining the ability to perform the work in general does not amount to substantial limitation of the activity of working." *Id.* at 727. Moreover, with language tailored to *all* major life activities under the ADA, the court held that "[a]n impairment that affects only a narrow range of jobs can be regarded either as not reaching a major life activity or as not substantially limiting one." *Id.* (citation omitted). The Sixth Circuit's rule, in contrast, expressly provides that an individual is substantially limited in the major life activity of performing manual tasks if her impairment affects her "ability to perform the range of manual tasks associated with an assembly line job." App. 4a.

II. THE DECISION BELOW CONFLICTS WITH THIS COURT'S RECENT PRECEDENTS CONSTRUING THE ADA

Not surprisingly, in placing itself in conflict with the other circuits, the court below misapplied this Court's precedents. Specifically, the Sixth Circuit departed from this Court's decisions in two important ways. *First*, by requiring that an impairment merely "affect" instead of "significantly restrict" a major life activity to constitute a disability, the panel ignored—indeed, it did not even cite—this Court's decision in *Albertson's, Inc.* v. *Kirkingburg*, 527 U.S. 555, 563 (1999), which rejected a similarly flawed interpretation of the ADA. *Second*, by allowing an individual to prove a substantial limitation on one major life activity—performing manual tasks—by demonstrating a mere effect on another major life activity—working—the panel below improperly conflated inquiries that this Court has recognized as distinct. *See Sutton* v. *United Air Lines, Inc.*, 527 U.S. 471, 491-493 (1999); *Murphy* v. *United Parcel Serv., Inc.*, 527 U.S. 516, 523-525 (1999). These additional conflicts provide an alternative basis for granting the petition. *See* S. Ct. Rule 10(c) (one of the principal considerations governing the

exercise of certiorari jurisdiction is whether a court of appeals "has decided an important question in a way that conflicts with relevant decisions of this Court").

The errors that the Sixth Circuit committed in determining who is an individual with a disability under the ADA are virtually identical to the Ninth Circuit's "missteps" that this Court thought "worthwhile to address" in *Kirkingburg*. 527 U.S. at 562. The question there was whether the plaintiff's monocular vision alone "substantially limit[ed]" him in the major life activity of seeing. *Id.* at 563. The Ninth Circuit acknowledged that to be substantially limited, the plaintiff had to be "[s]ignificantly restrict[ed] as to the condition, manner or duration under which [he] can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity." 29 C.F.R. § 1630.2(j)(1)(ii). In finding that the plaintiff's impairment significantly restricted him, the Ninth Circuit reasoned that "the manner in which Kirkingburg sees differs significantly from the manner in which most people see because * * * he sees using only one eye; most people see using two." *Kirkingburg*, 527 U.S. at 564 (brackets and internal quotation marks omitted).

This Court, however, found that the court of appeals "was too quick to find a disability." *Id.* Instead of requiring ADA plaintiffs to demonstrate a "significant restriction" in their ability to perform a major life activity, the Ninth Circuit "appeared willing to settle for a mere difference." *Id.* at 565. This Court explained that "[b]y transforming 'significant restriction' into 'difference,' the court undercut the fundamental statutory requirement that only impairments causing 'substantial limitations' in individuals' ability to perform major life activities constitute disabilities." *Id.* (brackets omitted).

Just as the Ninth Circuit mistakenly thought a "mere difference" in an individual's manner of performing a major life activity constituted a disability, the majority below improperly thought it sufficient that an individual's impairments merely "*affect* manual tasks associated with working." App. 6a (emphasis added). Although "the Act 'addresses substantial limitations on major life activities, not utter inabilities,' it concerns itself only with limitations that are *in fact substantial*." *Kirkingburg*, 527 U.S. at 565 (quoting *Bragdon* v. *Abbott*, 524 U.S. 624, 641 (1998)) (emphasis added). As this Court held in *Sutton*, " 'substantially' suggests 'considerable' or 'specified to a large degree.' " *Sutton*, 527 U.S. at 491 (quoting Webster's Third New International Dictionary 2280 (1976)); *see also* 17 Oxford English Dictionary 66-67 (2d ed. 1989) ("substantial": "[r]elating to or proceeding from the essence of a thing; essential"; "of ample or considerable amount, quantity or dimensions"). That an impairment merely "affects" a major life activity says absolutely nothing about whether it limits substantially, considerably, or to a large degree an individual's ability to perform that same activity. 42 U.S.C. § 12102(2)(A). *See Snow*, 128 F.3d at 1207 ("It is not enough that an impairment affect a major life activity; the plaintiff must proffer evidence from which a reasonable inference can be drawn that such activity is substantially or materially limited.").

Moreover, as Judge Boggs explained in dissent below, to say that a plaintiff is substantially limited in performing manual tasks simply because she has an impairment that affects her ability to perform tasks *at work* "conflates (and erodes) the standards for demonstrating a substantial limitation on 'working' and on 'performing manual tasks.' " App. 11a (Boggs, J., dissenting); *see id.* 4a ("in order to be disabled the plaintiff must show that her manual disability involves a 'class' of manual activities affecting the ability to perform tasks at work"). These are, as Judge Boggs noted, "separate inquiries." *Id.* 11a.

This Court's decision in *Sutton* confirms that "working" and "performing manual tasks" are indeed distinct inquiries, and that each must be resolved without reference to the other. There, this Court emphasized that "working [should] be viewed as a residual life activity, considered, as a last resort, *only* '[i]f an individual is not substantially limited with respect to *any other* major life activity.' " *Sutton*, 527 U.S. at 492 (quoting 29 C.F.R. pt. 1630, App. § 1630.2(j) (1998)) (emphasis in original). A corollary to this principle is that "[i]f an individual is substantially limited in *any other* major life activity, *no determination should be made* as to whether the individual is substantially limited in working." *Id.* (quoting 29 C.F.R. pt. 1630, App. § 1630.2(j)) (first emphasis in original, second emphasis added).

The Sixth Circuit's hybrid rule—incorporating elements of "working" into a "performing manual tasks" inquiry—violates *Sutton*'s injunction to make "no determination" regarding the major life activity of working until the court has assessed all other major life activities. That is because the rule requires a court to evaluate how an impairment affects a plaintiff's ability to work in order to determine whether that impairment limits the major life activity of performing manual tasks. Not only does the panel's decision improperly fuse two distinct analyses into one, but it also significantly eases a plaintiff's evidentiary burden under the ADA by declaring that a mere effect—not a significant restriction—on the major life activity of working is enough to demonstrate a substantial limitation on performing manual tasks. As Judge Boggs recognized in dissent below:

> it seems to me that if considering the concept of working is only a "last resort," the opinion today mistakenly takes what is here primarily a *subset* of abilities related to working, the ability to "perform manual tasks," and erroneously treats a partial limitation there as substantially limiting a major life activ-

ity. [App. 11a (Boggs, J., dissenting) (emphasis in original).]

That "undercuts the fundamental statutory requirement that only impairments causing 'substantial limitations' in individuals' ability to perform major life activities constitute disabilities." *Kirkingburg*, 527 U.S. at 565.

III. THE CONFLICT AMONG THE CIRCUITS CONCERNS AN IMPORTANT AND RECURRING ISSUE THAT SHOULD BE DECIDED BY THIS COURT

The multiple conflicts presented by this petition provide a compelling basis for plenary review, but the need for certiorari is heightened still further by the important and recurring nature of the basic question presented: whether an impairment constitutes a disability under the ADA if it precludes an individual from performing a narrow subset of tasks associated with her specific job. This question is exceptionally important to employers in private industry because repetitive-motion injuries like CTS are becoming increasingly widespread among American workers. As more and more employees develop isolated repetitive-motion injuries, many of which may preclude them from performing the manual tasks associated with an aspect of a specific job, the extent to which employers must offer costly accommodations to this rapidly growing segment of the workforce will assume critical importance.

In 1990, cumulative trauma disorders, of which CTS is one, affected 185,400 American workers. *See* Joan E. Rigdon, *The Wrist Watch: How a Plant Handles Occupational Hazard with Common Sense*, Wall St. J., Sept. 28, 1992, at A1. That was almost *nine times* the number reported only eight years earlier. *See id.* And while repetitive stress accounted for only 21% of all workplace injuries in 1982, by 1992, it had grown to represent 56% of those injuries. *See*

Paul J. Lim, *Innovations for Carpal-Tunnel Syndrome Prospering*, Wall St. J., Aug. 24, 1992, at B2.

This trend has only accelerated in recent years. In 1996 alone, doctors performed 358,000 ambulatory surgery procedures solely to release carpal tunnel. *See* Statistical Abstract of the United States 141 tbl. 215 (119th ed. 1999). More importantly, in 1998, CTS alone caused employees in private industry to miss 26,266 days of work collectively. *See* U.S. Dep't of Labor, Bureau of Labor, Report of Nonfatal Occupational Injuries at tbl. R49 (Nov. 16, 2000) <http://stats.bls.gov/oshC_D98.htm>. The manufacturing industry accounted for nearly half of those days—11,630. *Id.*

These statistics illustrate that while CTS and other repetitive-motion injuries are increasingly prevalent in the workplace, they are not novel. The volume of circuit decisions handed down in the last five years involving ADA claims based on repetitive-motion injuries confirms that. *See, e.g.*, *Chanda*, 2000 WL 1772682, at *3; *Broussard*, 192 F.3d at 1259; *Hilburn*, 181 F.3d at 1222-1223; *Gutridge*, 153 F.3d at 900; *Skorup*, 153 F.3d at 513; *Dalton* v. *Subaru-Isuzu Auto., Inc.*, 141 F.3d 667, 671-674 (7th Cir. 1998); *Snow*, 128 F.3d at 1204-1205; *Dutcher*, 53 F.3d at 724-726; *Shpargel* v. *Stage & Co.*, 914 F. Supp. 1468, 1474 (E.D. Mich. 1996); *Terrell* v. *USAir, Inc.*, 955 F. Supp. 1448, 1453 (M.D. Fla. 1996), *aff'd*, 132 F.3d 621 (11th Cir. 1998). Until the Sixth Circuit's decision below, the consensus among the circuits was that "[a]n impairment that affects only a narrow range of jobs can be regarded as not reaching a major life activity or as not substantially limiting one." *Dutcher*, 53 F.3d at 727 (citation omitted).

This view reflects Congress's considered judgment that the ADA should "concern[] itself only with limitations that are in fact substantial," *Kirkingburg*, 527 U.S. at 565, and not encompass "[p]ersons with minor, trivial impairments." S. Rep. No. 101-116, at 23 (1989). The reason: the ADA is an

antidiscrimination statute designed to extend to persons with disabilities "the same civil right protections provided to women and minorities beginning in 1964." H.R. Rep. No. 101-485, pt. 3 at 26 (1990). The Sixth Circuit's decision, however, threatens to remove the ADA from its antidiscrimination moorings and transform it into what it most certainly is not: "a general protection of medically afflicted persons." *Christian* v. *St. Anthony Med. Ctr., Inc.*, 117 F.3d at 1053.

Finding disabilities where employees can no longer perform only a narrow range of job-specific tasks advances no legitimate antidiscrimination principle. Indeed, employees who are precluded from only a narrow category of jobs are hardly who Congress had in mind when it found that

> individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society. [42 U.S.C. § 12101(a)(7).]

Individuals with the same sort of impairments should not be covered under the ADA in one part of the country but not in another. Employees working for the same national company should not have coverage turn on which plant they happen to work at. This Court should grant review of the divided decision below to ensure that the ADA is construed in a uniform manner across the country.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 99-5234

ELLA WILLIAMS,
Plaintiff-Appellant,

v.

TOYOTA MOTOR MANUFACTURING, KENTUCKY, INC.,
Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Kentucky
Henry R. Wilhoit, Jr., Chief Judge, Presiding

Argued and Submitted February 1, 2000
Decided and Filed August 29, 2000

Before: MERRITT, BOGGS, and MOORE, Circuit Judges.

AMENDED OPINION

MERRITT, Circuit Judge. In this case under the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101, *et seq.*, plaintiff Ella Williams was transferred by the defendant auto manufacturer to the paint inspection section of the defendant's quality control operation in its Kentucky assembly plant because the manual tasks Williams had been performing on the assembly line using pneumatic tools had caused her to develop carpal tunnel syndrome and tendinitis in her hands and arms. Williams then spent approximately three years inspecting cars on the assembly line for defective paint and manually wiping down each newly painted car as it passed on the conveyor. Taking the facts in the light most favorable to the plaintiff, as we must when the district court has granted summary judgment for the defendant-employer, Williams' job duties were then expanded to include another job in the paint inspection section requiring her to grip a block of wood with a sponge attached to the end and wipe down the passing cars with a highlight oil at the rate of approximately one car per minute. In addition to gripping the block of wood, this new work required Williams to keep her hands and arms up around shoulder height repetitively over several hours. Her ligament and muscle problems reappeared in a more severe form as a result of the new job, with tendinitis now in her shoulders and neck as well. As a result, Williams asked her employer to assign her back to her former jobs within the paint inspection section. The employer refused according to Williams, but the employer disputes this fact. The central question in this case is whether the employer violated the ADA by refusing to accommodate Williams by allowing her to return to her former, less strenuous work within paint inspection. The district court granted summary judgment against the plaintiff primarily on the ground that she does not have a "disability," as defined in the Act, and therefore is not covered by the Act. The key issue before us is simply whether plaintiff's physical difficulties in using her hands, arms and shoulders, as required by her new job within paint inspection, constitute a

"disability." In other words, should Williams' inability to perform certain manual tasks bring her within the coverage of the Act. Williams also claims that the defendant violated the ADA by terminating her due to her disability. The district court found that Williams failed to make a prima facie case with respect to her wrongful termination claim, because Williams was completely restricted from doing any kind of work at the time of her termination and therefore could not be a qualified individual under the ADA.

The ADA is unclear as to when it should be applied to protect an employee, as the Supreme Court recently suggested in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 119 S. Ct. 2139, 144 L.Ed.2d 450 (1999). The Act provides that the employer may not "discriminate against a qualified individual with a disability because of the disability . . . in regard to . . . hiring, advancement, or discharge of employees, employees compensation, job training, and other terms . . . of employment." § 12112(a). The phrase "qualified individual with a disability" is defined as a person "with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." § 12111(8). In the crucial section in the litigation before us, the Act defines the word "disability" as follows:

> (A) A physical or mental impairment that *substantially limits one or more of the major life activities* of such individual;
>
> (B) A record of such impairment; or
>
> (C) Being regarded as having such an impairment.

§ 12102(2) (emphasis added).

The EEOC in its regulations interpreting the ADA and the Supreme Court in *Sutton* have said that the language in the definition of disability that the impairment in question must "substantially limit[ ] one or more of the major life activities" requires for the major life activity of "working" that the individual be unable to perform a class or broad range of

jobs. The analysis must be class based. "One must be precluded from more than one type of job," i.e., "a substantial class of jobs." *Sutton*, 119 S. Ct. at 2151. The plaintiff here asserts primarily that her impairments disable her from performing manual tasks,[1] a different disability from "working," the disability at issue in the *Sutton* case. It would appear, nevertheless from the language of the Act, the EEOC's interpretation and the Supreme Court's analysis in *Sutton* that in order to be disabled the plaintiff must show that her manual disability involves a "class" of manual activities affecting the ability to perform tasks at work.

In this case, taking the evidence in the light most favorable to the plaintiff, we conclude that the plaintiff's set of impairments to her arms, shoulders and neck are sufficiently disabling to allow the factfinder to find she crosses the threshold into the protected class of individuals under the ADA -who must be accorded reasonable accommodation. Her ailments are analogous to having missing, damaged or deformed limbs that prevent her from doing the tasks associated with certain types of manual assembly line jobs, manual product handling jobs and manual building trade jobs (painting, plumbing, roofing, etc.) that require the gripping of tools and repetitive work with hands and arms extended at or above shoulder levels for extended periods of time.

The fact that Williams can perform a range of isolated, non-repetitive manual tasks performed over a short period of time, such as tending to her personal hygiene or carrying out personal or household chores, does not effect a determination that her impairment substantially limits her ability to perform the range of manual tasks associated with an assembly line job. In addition, looking at all of the evidence most favorably to the plaintiff, the duration of Williams' impairment, as well as the expected permanent impact of it,

[1] Although Williams has also claimed that she is substantially limited in the major life activities of lifting and working, in addition to manual tasks, her counsel conceded during oral argument that Williams' strongest claim pertained to the major life activity of performing manual tasks.

are inferable from the permanent work restrictions prescribed by Williams' treating physicians. As a result, we conclude there is sufficient evidence to support a finding that Williams was substantially limited as to a major life activity and that the district court's grant of summary judgment for the defendant was inappropriate.

Because we conclude that Williams is substantially limited in performing manual tasks, we do not need to determine whether Williams is substantially limited as to the major life activities of lifting or working. Moreover, as to the major life activity of working, the case of *McKay v. Toyota Motor Mfg., U.S.A., Inc.*, 110 F.3d 369 (6th Cir.1997), is distinguishable from the case at hand. *McKay* was decided before the Supreme Court recognized in Sutton that "there may be some conceptual difficulty in defining 'major life activities' to include work, for it seems to argue in a circle to say that if one is excluded, for instance, by reason of [an impairment, from working with others] . . . then that exclusion constitutes an impairment, when the question you're asking is, whether the exclusion itself is by reason of handicap." 119 S. Ct. at 2151 (internal citation omitted). The *Sutton* Court further noted that 'even the EEOC has expressed a reluctance to . . . include working and has suggested that working be viewed as a residual life activity, considered, as a last resort, *only* '[i]f an individual is not substantially limited with respect to *any other* major life activity.'" *Id.* (quoting 29 C.F.R. pt. 1630, App. § 1630.20)) (emphasis in original).

In this case, the plaintiff's claim is not based solely on the difficult concept that she is disabled as to work generally, but rather, includes the rather simple concept that she is disabled as to performing manual tasks because she suffers from a severe impairment to her limbs, shoulders and neck that seriously reduces her ability to perform the manual tasks that are job-related. Ultimately, *McKay* is distinguishable from this case for the same reason that *Sutton* is, in that these cases only turned on the "difficult concept" of working which is viewed as a "last resort." The concept of "manual tasks" requires a disability analysis to come before the life activity

of working is considered and includes looking at a person's ability to use their limbs in a way called for by a broad range or class of manual activities that, as in this case, require the gripping of tools and arms to be kept overhead or at shoulder level repetitively for an extended period of time. Here, the impairments of limbs are sufficiently severe to be like deformed limbs and such activities affect manual tasks associated with working, as well as manual tasks associated with recreation, household chores and living generally. The notion of "class" advocated by the *Sutton* Court can be based on a more limited concept than "working," and can be based on limits on manual activities which can affect other major life activities. Moreover, we believe Williams's impairment is more severe than the *McKay* plaintiff's, rendering, Williams "[s]ignificantly restricted as to the condition, manner or duration under which [she] can perform [manual tasks] as compared to the condition, manner, or duration under which the average person in the general population can perform [them]." 29 C. F. R. § 1630.2(j)(1)(ii).

Because we conclude that Williams has made the necessary showing under § 12102(2)(A) that she suffers from an actual impairment that substantially limits a major life activity to survive a motion for summary judgment, we need not address her claims that she was disabled because she had a record of a qualifying impairment, pursuant to § 12102(2)(B), or that, in the alternative, she was disabled because she was regarded as having such an impairment, pursuant to § 12102(2)(C). As to Williams's wrongful termination claim, however, we agree with the district court that, because Williams is restricted completely from working, she cannot claim to be a "qualified individual with a disability" within the meaning of the ADA; therefore, that claim must fail.

Although we have concluded that Williams is disabled and that there is a triable issue of fact as to whether the defendant auto manufacturer failed to reasonably accommodate her disability, it is important to note that Williams must still demonstrate the remainder of her prima facie case, and that the defendant is still free to raise any viable defenses as to

why it was unable to accommodate Williams, such as undue hardship and business necessity. To the extent that there is concern that employers may be required to answer in court "for every employment practice that draws distinctions based on physical attributes," nothing in this opinion should be construed to undermine an employer's ability to rely on an appropriate affirmative defense. Sutton, 119 S. Ct. at 2160 (Stevens, J., dissenting).

In regard to Williams's FMLA claim, we conclude that the district court properly granted summary judgment in favor of the defendant. The FMLA entitles an eligible employee with a serious health condition to 12 work weeks of unpaid medical leave, 29 U.S.C. § 2612(a)(1)(D), and if an employee's FMLA rights are violated, then they are entitled to recover certain damages. § 2617. On appeal, Williams does not dispute the defendant's claim that, assuming arguendo she was improperly denied FMLA leave, she has suffered no damages.[2] Williams has pointed to no economic benefits that she has lost from the denial of FMLA leave. In fact, Williams offered no evidence of any damages in her brief or at oral argument. Moreover, as the district court noted, Williams testified that on December 6, 1996, her last day of work at the assembly plant, she was placed under a no work of any kind restriction by one of her doctors and that she was still under this restriction nearly nine months after she stopped working at the assembly plant. Williams' contention on appeal that this fact is actually a matter of dispute is unpersuasive, as a review of Williams' deposition transcript reveals that she unequivocally stated that she was

[2] We do not decide whether 29 U.S.C. § 2617(a)(3), which grants attorney fees and costs to a successful plaintiff, applies to a case such as this one, where the plaintiff might be able to show a violation of the FMLA but cannot obtain a monetary judgment or injunctive relief. Although the district court addressed the applicability of § 2617(a)(3) in its memorandum opinion, the plaintiffs do not press this issue on appeal, and we therefore do not consider it.

restricted at the time of her termination and up until at least nine months later from doing any work of any kind, not even office jobs. Even if Williams was wrongfully terminated on January 27, 1997, within the 12-week period covered by the FMLA, she has failed to direct this court to any specific evidence supporting her claim that she was mistaken about her work restrictions when she gave her deposition and that she could have returned to work eventually. *Cf. Plant v. Morton Int'l, Inc.*, 212 F.3d 929, 934-36 (6th Cir.2000) (holding that an employee's inability to return to work within twelve weeks did not foreclose his FMLA claim, where he could have returned to work eventually and the employer failed to give notice that his FMLA leave time had begun to run.) Williams therefore cannot demonstrate that she was entitled to reinstatement under § 2617.

Accordingly, we REVERSE the district court's ruling as it pertains to the plaintiff's ADA claim for failure to accommodate and REMAND for further proceedings, but AFFIRM the district court's ruling on Williams's FMLA claim and her claim for wrongful termination.

BOGGS, Circuit Judge, concurring in part and dissenting, in part.

I concur in the court's judgment on the non-ADA portions of this case. I also agree with the court's citation of the Supreme Court in *Sutton* that "there may be some conceptual difficulty" in dealing with the definition of work as a "major life activity" in ADA cases. Slip op. at 5, *quoting Sutton v. United Air Lines*, 527 U.S. 471, 119 S. Ct. 2139, 21519 144 L.Ed.2d 450. However, because I believe that the court's attempts to deal with this conceptual difficulty are flawed, I respectfully must dissent from its interpretation of the ADA.

The plaintiff in this case can do many things that would be considered "work" and many things that would be considered "manual tasks." At the same time, Ms. Williams has difficulty with some other activities that would fall into each category. Toyota had already accommodated Williams, after she had complained of some limitations, by assigning her to a

subset of the tasks generally performed by a worker in the paint inspection unit. Specifically, she was assigned two of the four jobs usually given to such a worker—inspecting the assembly and paint jobs and, as the court correctly notes, "manually wiping down each newly painted car." Toyota later asked her to perform a third job (though still not all four) of those jobs usually assigned to someone in her position. This new task also required her to "wipe down the passing cars," but apparently this wiping was performed with a tool requiring more gripping, and at a greater height than in her existing tasks.

This task caused Williams considerably more physical difficulty. Of course not every amount of physical difficulty with any one task will be considered a disability. As the court discerns, under *McKay* and under other decisions of this and other courts, this inability to perform certain types of tasks would not likely constitute being disabled with regard to the major life activity of working. In particular, this court has held that the inability to perform a single, particular job does not constitute a substantial limitation on working. *See Gilday v. Mecosta County*, 124 F.3d 760, 767 (6th Cir.1997) (Kennedy, J., concurring in part and dissenting in part) (collecting cases); *Cf. Sullivan v. River Valley Sch. Dist., et al.*, 197 F.3d 804, 811 (6th Cir.1999) (holding that "a mere deterioration in performance at a single particular job cannot constitute a disability").

Therefore, the court decides to look instead to the major life activity of "performing manual tasks." *See* 29 C.F.R. § 1630.2(i). As does the concept of working, the activity of "performing manual tasks" raises the question just how much of a diminution in that ability constitutes a disability. Certainly the record evidence shows that Williams can perform many manual tasks, beginning, most obviously, with the wiping task that she already had been doing prior to her newest assignment. In addition, the record shows that she can perform the manual tasks of brushing her teeth, laundering her clothes, and doing some driving. In fact, as the court's opinion again correctly notes, Williams's

difficulty is almost exclusively with the inability to do manual tasks that "require the gripping of tools and repetitive work with hands and arms extended at or above shoulder levels for extended periods of time." Maj. op. at 842-43.

I see no citations in the court's opinion, either to regulations or to cases, indicating that such a specific and partial limitation is considered a disability with regard to the major life activity of "performing manual tasks." In one prior case in which a plaintiff with carpal tunnel syndrome claimed a substantial limitation in his ability to perform manual tasks, the claim was rejected because "plaintiff could work at Stage performing the manual tasks of slicing and chopping food, installing locks, and fixing various items at Stage for [only] eight hours per day . . . [which] type of impairment does not constitute a significant restriction on plaintiff's ability to perform manual tasks or any other major life activity." *Shpargel v. Stage & Co.*, 914 F. Supp. 1468, 1474 (E.D. Mich. 1996), *citing McKay*, 878 F. Supp. 1012, 1014-15, *and Fink v. Kitzman*, 881 F. Supp. 1347, 1377 (N.D. Iowa 1995). Likewise, another plaintiff failed to present a triable issue on whether her carpal tunnel syndrome "substantially limits" the major life activity of caring for herself despite "the routine tasks that she must perform with adjustment, including: carry groceries only in light bags; carry laundry in small loads; obtain assistance to move furniture, open cans; properly make a bed. She cannot 'effectively' brush her teeth or hair and experiences discomfort in gripping the steering wheel while driving a car." *Terrell v. USAir, Inc.*, 955 F. Supp. 1448, 1453 (M.D. Fla. 1996), *citing Dutcher v. Ingalls Shipbuilding*, 53 F.3d 723, 726 (5th Cir.1995), *aff'd*, 132 F.3d 621 (11th Cir.1998). Measuring Williams's limitation against plaintiffs claiming similar limitations on other major life activities, she does not appear disabled. If McKay, despite some diminution in ability, is not "substantially limit[ed]" from working, as that term is defined in 29 C.F.R. § 1630(2)(j)(1-3), I fail to see how Williams, who has some comparable diminution in performing manual tasks, *is* so limited. By defining the standard for a substantial limitation on "performing manual

tasks" far less stringently than the standards for "caring for oneself" and "working" have been defined, the court appears to undercut *McKay* and its progeny.

More importantly, it seems to me that if considering the concept of working is only a "last resort," the opinion today mistakenly takes what is here primarily a *subset* of abilities related to working, the ability to "perform manual tasks," and erroneously treats a partial limitation there as substantially limiting a major life activity. The court states that "the plaintiff must show that her manual disability involves a 'class' of manual activities affecting the ability to perform tasks at work" in order to be disabled. Maj. op. at 843. This description of the plaintiff's burden in defeating summary judgment conflates (and erodes) the standards for demonstrating a substantial limitation on "working" and on "performing manual tasks." To defeat summary judgment as to the existence of a disability, Williams must demonstrate a genuine issue of material fact that her impairment substantially limits the major life activity of either "working" or "performing manual tasks." These are separate inquiries, as the court implicitly concedes in seeking to distinguish this case from *McKay*. Williams has not shown a substantial limitation in working, because the inability to perform a single, particular job is not a substantial limitation, and she has not demonstrated that there is a broader class of jobs from which her impairment disqualifies her. Nor has Williams shown a substantial limitation in performing manual tasks, because her limitation is mostly confined to a subset of job-specific tasks.

I therefore respectfully dissent.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 99-5234

ELLA WILLIAMS,
Plaintiff-Appellant,

v.

TOYOTA MOTOR MANUFACTURING, KENTUCKY, INC.,
Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Kentucky
Henry R. Wilhoit, Jr., Chief Judge, Presiding

Argued and Submitted February 1, 2000
Decided and Filed July 10, 2000

Before: MERRITT, BOGGS, and MOORE, Circuit Judges.

OPINION

MERRITT, Circuit Judge. In this case under the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101, *et seq.*, plaintiff Ella Williams was transferred by the defendant auto manufacturer to the paint inspection section of the defendants quality control operation in its Kentucky assembly plant because the manual tasks Williams had been performing on the assembly line using pneumatic tools had caused her to develop carpal tunnel syndrome and tendinitis in her hands and arms. Williams then spent approximately three years inspecting cars on the assembly line for defective paint and manually wiping down each newly painted car as it passed on the conveyor. Taking the facts in the fight most favorable to the plaintiff, as we must when the district court has granted summary judgment for the defendant-employer, Williams's job duties were then expanded to include another job in the paint inspection section requiring her to grip a block of wood with a sponge attached to the end and wipe down the passing cars with a highlight oil at the rate of approximately one car per minute. In addition to gripping the block of wood, this new work required Williams to keep her hands and arms up around shoulder height repetitively over several hours. Her ligament and muscle problems reappeared in a more severe form as a result of the new job, with tendinitis now in her shoulders and neck as well. As a result, Williams asked her employer to assign her back to her former jobs within the paint inspection section. The employer refused according to Williams, but the employer disputes this fact. The central question in this case is whether the employer violated the ADA by refusing to accommodate Williams by allowing her to return to her former, less strenuous work within paint inspection. The district court granted summary judgment against the plaintiff primarily on the ground that she does not have a "disability," as defined in the Act, and therefore is not covered by the Act. The key issue before us is simply whether plaintiff's physical difficulties in using her hands, arms and shoulders, as required by her new job within paint inspection, constitute a "disability." In other words, should Williams's inability to

perform certain manual tasks bring her within the coverage of the Act.

The ADA is unclear as to when it should be applied to protect an employee, as the Supreme Court recently suggested in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 119 S.Ct 2139 (1999). The Act provides that the employer may not "discriminate against a qualified individual with a disability because of the disability . . . in regard to . . . hiring, advancement, or discharge of employees, employees compensation, job training, and other terms . . . of employment." § 12112(a). The phrase "qualified individual with a disability" is defined as a person "with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." § 12111(8). In the crucial section in the litigation before us, the Act defines the word "disability" as follows:

> (A) A physical or mental impairment that *substantially limits one or more of the major life activities* of such individual;
>
> (B) A record of such impairment; or
>
> (C) Being regarded as having such .m impairment.

§ 12102(2) (emphasis added).

The EEOC in its regulations interpreting the ADA and the Supreme Court in *Sutton* have said that the language in the definition of disability that the impairment in question must "substantially limit[] one or more of the major life activities" requires for the major life activity of "working" that the individual be unable to perform a class or broad range of jobs. The analysis must be class based. "One must be precluded from more than one type of job," i.e., "a substantial class of jobs." *Sutton*, 119 S.Ct. at 2151. The plaintiff here asserts primarily that her impairments disable

her from performing manual tasks,[1] a different disability from "working," the disability at issue in the *Sutton* case. It would appear, nevertheless from the language of the Act, the EEOC's interpretation and the Supreme Court's analysis in *Sutton* that in order to be disabled the plaintiff must show that her manual disability involves a "class" of manual activities affecting the ability to perform tasks at work.

In this case, taking the evidence in the light most favorable to the plaintiff, we conclude that the plaintiff's set of impairments to her arms, shoulders and neck are sufficiently disabling to allow the factfinder to find she crosses the threshold into the protected class of individuals under the ADA who must be accorded reasonable accommodation. Her ailments are analogous to having missing, damaged or deformed limbs that prevent her from doing the tasks associated with certain types of manual assembly line jobs, manual product handling jobs and manual building trade jobs (painting, plumbing, roofing, etc.) that require the gripping of tools and repetitive work with hands and arms extended at or above shoulder levels for extended periods of time.

The fact that Williams can perform a range of isolated, non-repetitive manual tasks performed over a short period of time, such as tending to her personal hygiene or carrying out personal or household chores, does not effect a determination that her impairment substantially limits her ability to perform the range of manual tasks associated with an assembly line job. In addition, looking at all of the evidence most favorably to the plaintiff, the duration of Williams's impairment, as well as the expected permanent impact of it, are inferrable from the permanent work restrictions prescribed by Williams's treating physicians. As a result, we conclude there is sufficient evidence to support a finding that Williams was substantially limited as to a major life activity

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[1] Although Williams has also claimed that she is substantially limited in the major life activities of lifting and working, in addition to manual tasks, her counsel conceded during oral argument that Williams's strongest claim pertained to the major life activity of performing manual tasks.

and that the district court's grant of summary judgment for the defendant was inappropriate.

Because we conclude that a trial on the merits is necessary on Williams's ADA claim, we do no need to determine whether Williams is substantially limited as to the major life activities of lifting or working. Moreover, as to the major life activity of working, the case of *McKay v. Toyota Motor Mfg., U.S.A., Inc.*, 110 F.3d 369 (6th Cir. 1997), is distinguishable from the case at hand. *McKay* was decided before the Supreme Court recognized in *Sutton* that "there may be some conceptual difficulty in defining 'major life activities' to include work, for it seems to argue in a circle to say that if one is excluded, for instance, by reason of [an impairment, from working with others] . . . then that exclusion constitutes an impairment, when the question you're asking is, whether the exclusion itself is by reason of handicap." 119 S.Ct. at 2151 (internal citation omitted). The *Sutton* Court further noted that "even the EEOC has expressed a reluctance to . . . include working and has suggested that working be viewed as a residual life activity, considered, as a last resort, *only* '[i]f an individual is not substantially limited with respect to *any other* major life activity.'" *Id.* (quoting 29 C.F.R. pt. 1630, App. § 1630.20(j) (emphasis in original).

In this case, the plaintiff's claim is not based solely on the difficult concept that she is disabled as to work generally, but rather, includes the rather simple concept that she is disabled as to performing manual tasks because she suffers from a severe impairment to her limbs, shoulders and neck that seriously reduces her ability to perform the manual tasks that are job-related. Ultimately, *McKay* is distinguishable from this case for the same reason that *Sutton* is, in that these cases only turned on the "difficult concept" of working which is viewed as a "last resort." The concept of "manual tasks" requires a disability analysis to come before the life activity of working is considered and includes looking at a person's ability to use their limbs in a way called for by a broad range or class of manual activities that, as in this case, require the gripping of tools and arms to be kept overhead or at shoulder

level repetitively for an extended period of time. Here, the impairments of limbs are sufficiently severe to be like deformed limbs and such activities affect manual tasks associated with working, as well as manual tasks associated with recreation, household chores and living generally. The notion of "class" advocated by the Sutton Court can be based on a more limited concept than "working," and can be based on limits on manual activities which can affect other major life activities. Moreover, we believe Williams's impairment is more severe than the *McKay* plaintiff's, rendering Williams "[s]ignificantly restricted as to the condition, manner or duration under which (she] can perform [manual tasks] as compared to the condition, manner, or duration under which the average person in the general population can perform [them]." 29 C.F.R. § 1630-20)(1)(ii).

Because we conclude that Williams has made the necessary showing under § 12102(2)(A) that she suffers from an actual impairment that substantially limits a major life activity to survive a motion for summary judgment, we need not address her claims that she was disabled because she had a record of a qualifying impairment, pursuant to § 12102(2)(B), or that, in the alternative, she was disabled because she was regarded as having such an impairment, pursuant to § 12102(2)(C). Moreover, as to Williams's wrongful termination claim, if at trial it is found that she was in fact disabled, then her wrongful termination claim survives to the extent that she can establish either that she was terminated because of her disability or that her termination flowed from the defendant's wrongful failure to reasonably accommodate her.

Although we have concluded that there is a triable issue of fact as to whether Williams was disabled and as to whether the defendant auto manufacturer failed to reasonably accommodate her disability, it is important to note that the defendant is still free to raise any viable defenses as to why it was unable to accommodate Williams, such as undue hardship and business necessity. To the extent that there is concern that employers may be required to answer in court "for every employment practice that draws distinctions based

on physical attributes," nothing in this opinion should be construed to undermine an employer's ability to rely on an appropriate affirmative defense. *Sutton*, 119 S.Ct. at 2160 (Stevens, J., dissenting).

In regard to Williams's FMLA claim, we conclude that the district court properly granted summary judgment in favor of the defendant. The FMLA entities an eligible employee with a serious health condition to 12 work weeks of unpaid medical leave, 29 U.S.C. § 2612(a)(1)(D), and if an employee's FMLA rights are violated, then they are entitled to recover certain damages. § 2617. On appeal, Williams does not dispute the defendant's claim that, assuming *arguendo* she was improperly denied FMLA leave, she has suffered no damages. [2] Williams has pointed to no economic benefits that she has lost from the denial of FMLA leave. In fact, Williams offered no evidence of any damages in her brief or at oral argument. Moreover, as the district court rioted, Williams testified that on December 6, 1996, her last day of work at the assembly plant, she was placed under a no work of any kind restriction by one of her doctors and that she was still under this restriction nearly nine months after she stopped working at the assembly plant. Williams's contention on appeal that this fact is actually a matter of dispute is unpersuasive, as a review of Williams's deposition transcript reveals that she unequivocally stated that she was restricted at the time of her termination and up until at least nine months later from doing *any work of any kind,* not even office jobs. Even if Williams was wrongfully terminated on January 27, 1997, within the 12-week period covered by the FMLA, she has failed to direct this court to any specific evidence supporting her claim that she was mistaken about

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[2] We do not decide whether 29 U.S.C. § 2617(a)(3), which grants attorney fees and costs to a successful plaintiff, applies to a case such as this one, where the plaintiff might be able to show a violation of the FMLA but cannot obtain a monetary judgment or injunctive relief. Although the district court addressed the applicability of § 2617(a)(3) in its memorandum opinion, the plaintiffs do not press this issue on appeal, and we therefore do not consider it.

her work restrictions when she gave her deposition and that she could have returned to work eventually. *Cf. Plant v. Morton Int'l, Inc.*, -- F.3d --, 2000 WL 572458, at *4-5 (6th Cir. May 12, 2000) (holding that an employee's inability to return to work within twelve weeks did not foreclose his FMLA claim, where he could have returned to work eventually and the employer failed to give notice that his FMLA leave time had begun to run). Williams therefore cannot demonstrate that she was entitled to reinstatement tinder § 2617.

Accordingly, we REVERSE the district court's ruling as it pertains to the plaintiff's ADA claims and REMAND for a trial on the merits, but AFFIRM the district court's ruling on her FMLA claim.

BOGGS, Circuit Judge, concurring in part and dissenting in part. I concur in the court's judgment on the non-ADA portions of this case. I also agree with the court's citation of the Supreme Court in Sutton that "there may be some conceptual difficulty" in dealing with the definition of work as a "major life activity" in ADA cases. Slip op. at 5, *quoting Sutton v. United Airlines,* 119 S. Ct. 2139, 2151. However, because I believe that the courts attempts to deal with this conceptual difficulty are flawed, I respectfully must dissent from its interpretation of the ADA.

The plaintiff in this case can do many things that would be considered "work" and many things that would be considered "manual tasks." At the same time, Ms. Williams has difficulty with some other activities that would fall into each category. Toyota had already accommodated Williams, after she had complained of some limitations, by assigning her to a subset of the tasks generally performed by a worker in the paint inspection unit. Specifically, she was assigned two of the four jobs usually given to such a worker—inspecting the assembly and paint jobs and, as the court correctly notes, "manually wiping down each newly painted car." Toyota later asked her to perform a third job (though still not all four) of those jobs usually assigned to someone in her position. This new task also required her to "wipe down the

passing cars," but apparently this wiping was performed with a tool requiring more gripping, and at a greater height than in her existing tasks.

This task caused Williams considerably more physical difficulty. Of course not every amount of physical difficulty with any one task will be considered a disability. As the court discerns, under *McKay* and under other decisions of this and other courts, this inability to perform certain types of tasks would not likely constitute being disabled with regard to the major life activity of working. In particular, this court has held that the inability to perform a single, particular job does not constitute a substantial limitation on working. *See Gilday v. Mecosta County*, 124 F.3d 760, 767 (6th Cir. 1997) (Kennedy, J., concurring in part and dissenting in part) (collecting cases); *Cf. Sullivan v. River Valley Sch. Dist., et al.*, 197 F.3d 804, 811 (6th Cir. 1999) (holding that "a mere deterioration in performance at a single, particular job cannot constitute a disability").

Therefore, the court decides to look instead to the major life activity of "performing manual tasks." *See* 29 C.F.R. § 1630.2(i). As does the concept of working, the activity of "performing manual tasks" raises the question just how much of a diminution in that ability constitutes a disability. Certainly the record evidence shows that Williams can perform many manual tasks, beginning, most obviously, with the wiping task that she already had been doing prior to her newest assignment. In addition, the record shows that she can perform the manual tasks of brushing her teeth, laundering her clothes, and doing some driving. In fact, as the court's opinion against correctly notes, Williams's difficulty is almost exclusively with the inability to do manual tasks that "require the gripping of tools and repetitive work with hands and arms extended at or above shoulder levels for extended periods of time." Slip op. at 4.

I see no citations in the court's opinion, either to regulations or to cases, indicating that such a specific and partial limitation is considered a disability with regard to the major life activity of "performing manual tasks." In one

prior case in which a plaintiff with carpal tunnel syndrome claimed a substantial limitation in his ability to perform manual tasks, the claim was rejected because "plaintiff could work at Stage performing the manual tasks of slicing and chopping food, installing locks, and fixing various items at Stage for [only] eight hours per day . . . [which] type of impairment does not constitute a significant restriction on plaintiff's ability to perform manual tasks or any other major life activity." *Sheargel v. Stage & Co.*, 914 F. Supp. 1468, 1474 (E.D. Mich. 1996), *citing McKay*, 878 F. Supp. 10 12, 1014-15, *and Fink v. Kitzman*, 881 F. Supp. 1347, 1377 (N.D. Iowa 1995). Likewise, another plaintiff failed to present a triable issue on whether her carpal tunnel syndrome "substantially limits" the major life activity of caring for herself despite "the routine tasks that she must perform with adjustment, including: carry groceries only in light bags; carry laundry in small loads; obtain assistance to move furniture, open cans; properly make a bed. She cannot 'effectively' brush her teeth or hair and experiences discomfort in gripping the steering wheel while driving a car." *Terrell v. USAir, Inc.*, 955 F. Supp. 1448, 1453 (M.D. Fla. 1996), *citing Dutcher v. Ingalls Shipbuilding*, 53 F.3d 723, 726 (5th Cir. 1995), *aff'd*, 132 F.3d 621 (11th Cir. 1998). Measuring Williams's limitation against plaintiffs claiming similar limitations on other major life activities, she does not appear disabled. If McKay, despite some diminution in ability, is not "substantially limit[ed]" from working, as that term is defined in 29 C.F.R. § 1630(2)(j)(1-3), I fail to see how Williams, who has some comparable diminution in performing manual tasks, *is* so limited. By defining the standard for a substantial limitation on "performing manual tasks" far less stringently than the standards for "caring for oneself' and "working" have been defined, the court appears to undercut *McKay* and its progeny.

More importantly, it seems to me that if considering the concept of working is only a "last resort," the opinion today mistakenly takes what is here primarily a *subset* of abilities related to working, the ability to "perform manual tasks," and

erroneously treats a partial limitation there as substantially limiting a major life activity. The court states that "the plaintiff must show that her manual disability involves a 'class' of manual activities affecting the ability to perform tasks at work" in order to be disabled. Slip op. at 4. This description of the plaintiff's burden in defeating summary judgment conflates (and erodes) the standards for demonstrating a substantial limitation on "working" and on "performing manual tasks." To defeat summary judgment as to the existence of a disability, Williams must demonstrate a genuine issue of material fact that her impairment substantially limits the major life activity of either "working" or "performing manual tasks." These are separate inquiries, as the court implicitly concedes in seeking to distinguish this case from *McKay*. Williams has not shown a substantial limitation in working, because the inability to perform a single, particular job is not a substantial limitation, and she has not demonstrated that there is a broader class of jobs from which her impairment disqualifies her. Nor has Williams shown a substantial limitation in performing manual tasks, because her limitation is mostly confined to a subset of job-specific tasks.

I therefore respectfully dissent.

APPENDIX C

[Filed January 26, 1999]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON

CIVIL ACTION NO. 97-135

ELLA WILLIAMS,
Plaintiff.

v.

TOYOTA MOTOR MANUFACTURING, KENTUCKY, INC.,
Defendant.

MEMORANDUM & ORDER

This matter is before the Court on Defendant's motion for summary judgment [Record No. 99], Plaintiff's motion for partial summary judgment [Record No. 103], and two motions in limine filed by the Defendant [Record Nos. 96 and 147]. For the reasons stated below, Defendant's motion for summary judgment is granted. Consequently, the remaining motions are denied as moot.

I. Introduction

In April of 1997, Ella Williams filed a complaint against her former employer, Toyota Motor Manufacturing, Kentucky, Inc. ("TMMK") for alleged violations of Title I of the Americans with Disabilities Act, Title 42 U.S.C. §12101 *et seq.* ("ADA"), and the Kentucky Civil Rights Act, KRS Chapter 344. Later, Plaintiff amended her complaint to

include a count pursuant to the Family and Medical Leave Act, Title 29 U.S.C. § 2601 *et seq*. ("FMLA").

Defendant's motion for summary judgment seeks to dispose of Plaintiff s entire case. Plaintiff, on the other hand, has filed a motion for partial summary judgment addressing only her claims under the ADA. Plaintiff's ADA case charges the Defendant with two distinct acts of discrimination—a failure to provide reasonable accommodations and Plaintiff's ultimate termination from employment. Defendant's motion maintains that Plaintiff has failed to demonstrate a prima facie case of discrimination in that at no relevant time period did Plaintiff suffer from a disability or, in the alternative, that Plaintiff is not an otherwise qualified individual. Regarding Plaintiff's claim under the FMLA, Defendant argues that it too must fail as Plaintiff has failed to allege any injuries or damages that are cognizable under that statute. On the other hand, Plaintiff's motion for partial summary judgment seeks judicial determination that she suffers from a disability, was otherwise qualified, and that Defendant discriminated against her because of her disability.

II. Factual Background

Located in Georgetown, Kentucky, TMMK manufacturers automobiles and employees more than 7,500 people. In August of 1990, Plaintiff began her employment with TMMK and was first assigned to the company's Paint and Powertrain Department. Later, Plaintiff was permanently positioned on the assembly line where her duties included building car engines. Unfortunately, however, prolonged use of pneumatic tools in this position proved to be physically too demanding, and she was soon diagnosed with bilateral carpal tunnel syndrome and bilateral tendinitis by Defendant's in-house medical service, Industrial Health Services ("IHS").[1] Plaintiff began seeing Dr. James Kleinert.

[1] Industrial Health Services is a Kentucky corporation that provides occupational medicine services to TMMK. Occupational medicine is a specialty of medicine which deals with industrial

While it was Dr. Kleinert's belief that Plaintiff could continue working at TMMK, he placed permanent restrictions on her which precluded her from lifting twenty pounds maximum with frequent lifting or carrying objects weighing up to ten pounds; no constant repetitive use of both hands/arms, flexion/extension of the wrists/elbows, pinching/gripping, pushing/pulling; and no use of pneumatic or vibratory tools. These restrictions were then communicated to TMMK.

For the next couple of years, TMMK assigned Plaintiff to various "modified duty" jobs. However, Plaintiff soon became dissatisfied with her employer's response to the restrictions imposed by Dr. Kleinhert. Specifically, she felt as though TMMK was not providing her reasonable accommodations in that she was being assigned work which she believed fell outside her work restrictions. Accordingly, Williams filed a claim under Kentucky Workers' Compensation Act, which was eventually settled. Thereafter, she returned to work at TMMK but was again disappointed in her employer's willingness to accommodate her restrictions. Therefore, on June 10, 1993, Williams brought an action against TMMK in this Court alleging violations of the ADA. That suit too was settled and, as a part of that settlement, Williams returned to work at TMMK in December of 1993.

Upon her return, TMMK placed Plaintiff on a team in Quality Control Inspection Operations ("QCIO"), also known as Body Paint and Paint Inspection. Teams working in QCIO are responsible for four jobs or processes: (1) Assembly Paint ("assembly"); (2) Paint Second Inspection ("paint inspection"); (3) Shell Body Audit ("body shop inspection"); and (4) ED Surface Repair ("ED inspection"). These jobs are not typical production line positions. They require less physical activity and are known to Defendant's employees as the "easiest jobs" at TMMK. Plaintiff was initially placed in

and environmental safety medicine and the treatment of conditions that are derived from those environments. IHS refers nonoccupational problems to outside, private physicians.

Team 2, the team that performed both assembly and paint inspection. For at least the first couple of years, Plaintiff was rotated on a weekly basis between assembly and paint inspection. It is undisputed that Williams was physically capable of performing these jobs and that her actual performance was satisfactory. In fact, she received good evaluations from TMMK during this time.

In assembly, Williams was charged with the responsibility of visually inspecting painted cars which are moving slowly down a conveyor. Employees scan for scratches, dents, chips, or any other flaws that may have occurred during the assembly or paint process. On average, one car passes every 54 seconds. When Plaintiff began working in assembly, inspection required team members to open and shut the doors, trunk, and/or hoods of each passing car. Sometime during Plaintiff's tenure, however, the position was modified and became essentially a point in which each car was visually scanned for flaws with little or no manual tasks. The paint inspection process was a little more involved physically. Here, team members, using a ramp, positioned themselves in such a way as to be able to use their hands to manually wipe down each painted car as it moved along on the conveyor.

During the fall of 1996, Plaintiff was told by her Group Leader, Asa Crane, that Kendall Hall, a new assistant manager, eventually wanted team members to be able to rotate through all four of the QCIO processes. Recognizing this as an opportunity to become a better team member, and perhaps boost her chances of being promoted, Williams embraced the idea of being cross-trained on more jobs. She communicated her desire to Asa Crane who, through the assistance of IHS, determined that cross-training Williams on the body shop inspection process would pose no difficulty in light of Plaintiff's then existing work restrictions.

Plaintiff began training on the body shop inspection process sometime in late September or early October of 1996, and although it was a little more physically demanding than Plaintiff's previous QCIO jobs, she completed her training without difficulty. Team members in body paint

inspection, a pre-paint process, are required to apply a highlight oil on the hood, the fender, the doors, the rear quarter panel, hood and trunk of passing cars. The oil has a viscosity similar to salad oil, and is applied by spreading it on the car with a sponge attached to a block of wood. Having wiped the car down, the body paint employee simply visually inspects the passing car.

After working this position for only a short while, with weekly rotations back to either paint inspection and/or assembly, Plaintiff found that the increased physical activity, i.e., gripping the sponge handle, wiping the car with the oil, and the height of the car, was causing her great pain in the neck and shoulder area. As a result, Plaintiff saw Dr. Pradeep Bose, a physician in IHS. Dr. Bose diagnosed Plaintiff as having myotendonitis bilateral periscapulr, an inflammation of the muscles and tendons around both of her shoulder blades, myotendonitis and myositis bilateral forearms with nerve compression causing media nerve irritations, and thoracic outlet compression, a condition that causes pain in the nerves that lead to the upper extremities. Given this diagnoses, Plaintiff advised Crane that she was physically unable to work the body shop inspection job and that her placement there was possibly in violation of her work restrictions. Crane expressed Williams' concerns to IHS and TMMK's Human Resources Department, who evaluated the body paint inspection job and again concluded that it fell within Plaintiff's work restrictions. However, having come to the conclusion that she could not physically perform the duties of body paint inspection, Plaintiff offered to TMMK what she envisioned as a reasonable accommodation—allow her to return to her original two jobs in assembly and paint inspection, processes the Plaintiff always maintained that she could perform without difficulty. Or, in the alternative, that if she must be cross-trained on another QCIO process to allow it to be the ED inspection job, a much less strenuous position.

What followed next is disputed between the parties. According to Plaintiff, TMMK refused her request for a

change in her rotation and forced her to continue working the body paint inspection job for several weeks before it eventually caused her greater physical injury. On the other hand, Defendant's position seems to be that they were unable to accommodate Plaintiff's request because Williams only worked the body paint inspection job for one week. According to the Defendant, after Plaintiff spent one week in body paint inspection, she was rotated back to her original two positions and began missing a substantial amount of work. One thing, however, is clear and at least partially dispositive: on December 6, 1996, the last day Plaintiff worked at TMMK, she was placed under a *no work of any kind* restriction by several of her treating physicians. She never worked at TMMK again and, on January 27, 1997, Joetta Gay, TMMK's Assistant Manager of Employee Relations, sent Williams a letter announcing her termination and citing her poor attendance record.

III. Summary Judgement Standard

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c). Under Rule 56 the Court must view the evidence in the light most favorable to the nonmoving party. Thus, when examining the record all doubts and inferences must be construed in favor of the nonmoving party in an effort to determine if any genuine issues of material fact exist.

However, in a series of decisions commonly referred to as the "trilogy," *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1996); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), the Supreme Court lowered the movant's burden on a summary judgment motion. According to the Court, Rule 56(c) mandates the entry of summary judgment against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on

which that party will bear the burden of proof at trial. *See Celotex Corp.*, 477 U.S. at 322. Applying this new standard, the Sixth Circuit has developed a series of principles that are applied to motions for summary judgment. Among them, is the notion that a respondent cannot merely rely on the hope that the trier of fact will disbelieve the movant's denial of a disputed fact, but must present affirmative evidence in order to defeat a properly supported motion for summary judgment. *See Street v. J.C. Bradford & Co.*, 886 F.2d 1472 (6th Cir. 1989).

IV. Americans with Disabilities/Kentucky Civil Rights Act

Title I of the ADA prohibits an employer from discriminating against an otherwise qualified individuals with a disability simply because of such disability. *See* 42 U.S.C. § 12112(a) (1995). The Act works to preclude discrimination in all areas of employment including the application process, advancement, job training, discharge and other such terms, conditions, and privileges of employment. *See id.* Unlike its other federal civil rights counterparts, discrimination under the ADA includes the failure of an employer to make "reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability," § 12112(b)(5)(A), unless the employer can show that the "accommodation would impose an undue hardship on the operation of [its] business." *Id.*

In the absence of direct evidence, claims under the ADA, and the Kentucky Civil Rights Act,[2] are analyzed through the burden shifting mechanism first announced in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and further refined in *Texas Dep't of Community Affairs v. Burdine*, 450

[2] Because the Kentucky Civil Rights Act is to be construed consistently with the ADA, *see Hall v. Transit Authority*, 883 S.W.2d 984 (Ky. App. 1994), resolution of Plaintiff's federal claim is dispositive of her civil rights claim under Kentucky state law. *See also Brohm M.D. v. JH Properties, Inc.*, 149 F.3d 517 (6th Cir. 1998).

U.S. 248 (1981). Briefly, this now familiar framework places an initial burden on the plaintiff to demonstrate by a preponderance of the evidence a prima facie case of discrimination. Once achieved, an inference of discrimination arises which can be rebutted by the defendant upon a showing of some legitimate, non-discriminatory reason(s) for its challenged action. Of course, if a plaintiff is unable to establish a prima facie case, no presumption arises and the inquiry ceases. However, if an inference of discriminatory intent is established and properly rebutted by the defendant, the burden returns to the plaintiff to prove that the defendant's proffered explanation is merely a pretext for intentional discriminatory behavior. "While the burden of production shifts back and forth between the parties under the *McDonnell Douglas* framework, the ultimate burden of proving that the employer discriminated against the employee on account of his or her disability remains at all times with the employee." *Smith v. Chrysler Corp.*, 1998 WL 609781, at *5 (6th Cir. (Mich.)). The Plaintiff has not charged, and the record does not reveal, any direct evidence of discrimination. Accordingly, in order to withstand Defendant's motion for summary judgment, Plaintiff must utilize the *McDonnell Douglas* framework, and is charged with the task of coming forth with her prima facie case.

A. Failure to Accommodate.

Establishing a prima facie case under the ADA requires a plaintiff to show that—(1) she is an individual with a disability; (2) she is otherwise qualified for the job; and (3) that the defendant either refused to make a reasonable accommodation for her disability or made an adverse employment decision regarding her because of her disability. *See Smith v. Ameritech*, 129 F.3d 857, 866 (6th Cir. 1997). Plaintiff' s prima facie case is conducted one step at a time, and failure to produce sufficient evidence at any stage of the process must result in dismissal of her case. *See EEOC v. Avery Dennison Corp.*, 104 F.3d 858, 861 (6th Cir. 1997).

Initially, a plaintiff is required to show, by a preponderance of the evidence, that she suffers from a disability. *See*

Cassidy v. Detroit Edison Co., 138 F.3d 629, 633 (6th Cir. 1998) ("Disability is the threshold requirement to claim discrimination under the ADA."). Consistent with other federal civil rights legislation that work to curb discrimination against the disabled, the ADA provides three avenues by which a claimant may demonstrate her disabled status. First, a plaintiff may show the existence of a "physical or mental impairment that substantially limits one or more of the major life activities of such individual." § 12102(2)(A). Alternatively, one may be deemed disabled if she can show she "has a record of such an impairment," § 12102(2)(B), or that she is "being regarded as having such an impairment." § 12102(2)(C). Each definition stands independently of the other two, and satisfaction of one is all the ADA requires.

The plain text of the ADA does not refine in greater detail the above definitions. However, pursuant to § 12116, the Equal Employment Opportunity Commission has promulgated regulations designed to implement Title I of the ADA, and serve as useful guidance in the construction and interpretation of its terms. *See Bragdon v. Abbott*, 118 S.Ct. 2196, 2207 (1998) (in construing the ADA, the Court recognized "that the well-reasoned views of the agencies implementing a statute constitute a body of experience and informed judgment to which courts and litigants may property resort for guidance"). Further instruction may properly come from the Rehabilitation Act of 1973 and its implementing regulations which define "handicapped individual" in exactly the same manner as the ADA defines "disability." *See id.* at 2202.

As noted, one way a claimant can prove she is disabled under the Act is to show she suffers from a physical or mental impairment that substantially limits one or more of her major life activities. Courts and federal regulations interpreting this definition have dissected it into three distinct inquiries: physical or mental impairment, substantially limits and major life activities. *See* 29 CFR pt. 1630, App. p. 346-7 (1998); *Bragdon v. Abbott*, 118 S.Ct. 2196 (1998)

(determination of plaintiff's status as a disabled individual was conducted in a three part manner). The first step is to ascertain whether a plaintiff's condition constitutes an impairment. According to the regulations, a physical or mental impairment includes "[a]ny physiological disorder, or conditions, . . . affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine." 29 CFR § 1630.2(h)(1). Typically, this requirement is met without difficulty and exists primarily to foreclose the protections of the ADA from those who believe they are impaired because of some physical/mental characteristic that does not derive from a physiological disorder (i.e., eye or hair color, lefthandedness, and/or a quick temper). *See* 29 CFR pt. 1630, App. p. 347.

Next, a plaintiff must show that her impairment interferes with one or more of her major life activities. Major life activities mean "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 29 CFR § 1630.2(i). Rather than presenting an exhaustive list of what are and what are not major life activities, the intent of the phrase is to encompass "those basic activities that the average person in the general population can perform with little or no difficulty." 29 CFR pt. 1630, App. p. 347. For example, sitting, standing, lifting and reaching are also regarded as major life activities. *Id.*

Recognition of an impairment and the identification of a major life activity, or activities, set the stage for the third step of the disability inquiry. Because "[m]any impairments do not impact an individual's life to the degree that they constitute disabling impairments," *id.*, the ADA requires a plaintiff to set forth sufficient evidence that her impairment substantially limits on or more of her named major life activities. Certainly, this requirement is satisfied if the impairment renders the claimant completely "[u]nable to perform a major life activity that the average person in the

general population can perform." 29 CFR § 1630.2(j)(1)(i). However, it may also be met if the impairment leaves the claimant "[s]ignificantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity." *Id.* § 1630.2(j)(1)(ii). Given these standards, the regulations point to three factors that should be considered in determining whether an impairment substantially limits any major life activity: (1) the nature and severity of the impairment; (2) the duration or expected duration of the impairment; and (3) the permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment. *See id.* § 1630.2(j)(2)(i)-(iii).

When the major life activity in question is that of working, the regulations provide both a different standard as well as additional factors that should be taken into account. Here, a claimant houses the responsibility of showing that her impairment significantly restricts her from performing "either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities." *Id.* § 1630.2(j)(3)(i). Whether satisfaction of this burden is achieved is guided not only by the factors mentioned above—the nature, severity and duration of the impairment and its expected long term impact—but also by consideration of the following: (1) the geographical area to which the individual has reasonable access; (2) the job from which the individual has been disqualified because of an impairment, and the number and types of jobs utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (class of jobs); and/or (3) the job from which the individual has been disqualified because of an impairment, and the number and types of other jobs not utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the

impairment (broad range of jobs in various classes). *See* §1630.2(j)(3)(ii)(A)-(C).

Williams relies primarily upon §12102(2)(A) in an attempt to satisfy the threshold burden of showing she suffers from a disability. While she also seeks standing under § 12102(2)(B) and (C), having a record of disability and being regarded as disabled respectively, her reliance on these latter provisions is not nearly as great. Consequently, review of §12102(2)(B) and (C), and what they require, is temporarily postponed and will be left to later discussion.

(1) Plaintiff's Status as an Individual with a Disability; § 12101(2)(A)

As noted previously, Plaintiff has charged TMMK with two distinct acts of discrimination—a failure to accommodate her request for transfer, which occurred sometime during the Fall of 1996, and the Defendant's eventual termination of her employment in January of 1997. Because determining whether an individual is disabled requires examination of the claimant's condition at the time of the challenged discriminatory action, *see Kocsis v. Multi-Care Management*, 97 F.3d 876,884 (6th Cir. 1996), the first question is whether Williams' impairment, as it existed in the Fall of 1996, substantially limited one or more of her major life activities.

There is no doubt, and the parties do not dispute, that in the Fall of 1996 Williams suffered from a physical impairment. She has presented sufficient evidence of these impairments and has therefore met her burden in this regard.

Next, Plaintiff claims that the following non-work major life activities were substantially limited by her physical impairments during the Fall of 1996: (1) manual tasks; (2) housework; (3) gardening; (4) playing with her children; and (5) lifting.[3] While the regulations make no reference to

[3] When a plaintiff claims that her impairment substantially limits major life activities other than working, her claims with regard to the non-work major life activities should be considered first. *See* 29 CFR pt. 1630, App. p. 349 (1998); *Cassidy v. Detroit Edison Co.*, 138 F.3d 629, 633 (6th Cir. 1998).

housework, gardening or playing with children, the performance of manual tasks and lifting are specifically mentioned and are, therefore, considered major life activities as a matter of law. *See Colwell v. Suffolk Co. Police Dept.*, 158 F.3d 635, 642 (2d Cir. 1998). As to housework, gardening and playing with her children, the simple fact that these activities are not specifically mentioned in the regulations does not preclude their status as major life activities. *See Bragdon v. Abbott*, 118 S.Ct. 2196, 2205 (1998) (recognizing that the definition of "major life activities" under the ADA and the Rehabilitation Act is illustrative and not exhaustive). Rather, the Court must determine on its own whether or not they rise to the level of major life activities.

In *Bragdon* the Court, quoting the appellate court below, stated that "the plain meaning of the word 'major' denotes comparative importance and suggests that the touchstone for determining an activity's inclusion under the statutory rubric is its significance." *Id.* While activities such as gardening and doing housework may indeed be important to Ms. Williams, that is not the question presented. *See Colwell v. Suffolk Co. Police Dept.*, 158 F.3d 635, 642 (2d Cir. 1998)("In deciding whether a particular activity is a 'major life activity,' we ask whether that activity is a significant one within the contemplation of the ADA, rather than whether that activity is important to a particular plaintiff."). Instead, the question is whether these activities are so significant that they are deemed major life activities as contemplated by the ADA. When compared to activities such as walking, seeing, hearing, speaking and breathing, the Court cannot find that gardening, housework, playing with, or otherwise recreating with others, are such significant activities to warrant their inclusion into the "statutory rubric" of major life activities. *See Colwell v. Suffolk Co. Police Dept.*, 158 F.3d 635, 643 (2d Cir. 1998)(holding that gardening and housework are not a major life activities as contemplated by the ADA); *Weaver*

v. Florida Power & Light, 1996 WL 479117, *7 (S.D. Fla.)(holding that playing sports with plaintiff's children not a major life activity).

Having narrowed the inquiry, the next question is whether Plaintiff's physical impairment substantially limited her major life activities of performing manual tasks, lifting and/or working. With regards to the major life activity of performing manual tasks, Plaintiff's evidence is that she "has been restricted by both the IHS doctors and her personal doctor from performing manual tasks that require repetitive movement of her upper extremities or any work that must be performed above her chest level." (Plaintiff's Motion for Partial Summary Judgment, at 16). In addition, she is "precluded from any manual task that requires rotary or lateral movements of her head and neck. . . ." (Plaintiff's Motion for Partial Summary Judgment, at 16).

While these statements are intended to characterize Plaintiff as one who is perhaps completely "[u]nable to perform a major life activity that the average person in the general population can perform," 29 CFR §1630.2(j)(1)(i), they are irretrievably contradicted by Plaintiff's continual insistence that she could perform the tasks in assembly and paint inspection without difficulty; positions requiring manual tasks. In fact, during the relevant time period, Plaintiff's proposed reasonable accommodation was to be reassigned to assembly and paint inspection. Finally, Plaintiff has failed to present any evidence regarding the nature and severity of Plaintiff's impairment, the duration or expected duration of her impairment, or the permanent or long term impact resulting from the impairment. *See id.* § 1630.2(j)(2). Absent such evidence, no rational juror could conclude that Williams is substantially limited in her ability to perform manual tasks.

Plaintiff's assertion that she is substantially limited in her ability to lift fails for similar reasons. The only evidence presented on this issue is as follows: "Ms. Williams is also restricted by her doctors in her lifting . . . . Her 1993 restrictions prevent her from lifting more than 20 pounds, or

more than 10 pounds frequently." (Plaintiff's Motion for Partial Summary Judgment, at 16). Again, without the presentation of evidence sufficient to allow this Court to make a determination in conformity with the applicable regulations—for example, as to the duration and expected long term impact of Plaintiff's lifting restrictions—no rational juror could conclude that Plaintiff's ability to lift is substantially limited. *See Gutridge v. Clure*, 153 F.3d 898, 901 (8th Cir. 1998) (holding that "a general lifting restriction imposed by a physician, without more, is insufficient to constitute a disability within the meaning of the ADA"). Moreover, other circuits have concluded that physician imposed lifting restrictions similar to those imposed upon Williams, do not amount to a substantial limitation of the major life activity of lifting. *See e.g., Thompson v. Holy Family Hosp.*, 121 F.3d 537, 540 (9th Cir. 1997); *Gibbs v. St. Anthony Hosp.*, 107 F.3d 20, 1997 WL 57156 (10th Cir. (Okla.)); *Halperin v. Abacus Tech. Corp.*, 128 F.3d 191 (4th Cir. 1997) (holding as a matter of law that a 20-pound lifting limitation does not significantly restrict major life activities); *Aucutt v. Six Flags Over Mid-America, Inc.*, 85 F.3d 1311, 1319 (8th Cir. 1996) (same); *Ray v. Glidden Co.*, 85 F.3d 227 (5th Cir. 1996) (same); *Vaughan v. Harvard Indus., Inc.*, 926 F.Supp. 1340, 1346 (W.D. Tenn. 1996) (citing district court cases analyzing restrictions from 10 to 25 pounds).

Finally, Plaintiff claims that her physical impairment substantially limited her ability to work. In order to defeat Defendant's motion for summary judgment, Plaintiff must show more than an inability to perform a single job or the job of her choice. *See Skorup v. Modern Door Corp.*, 153 F.3d 512, 515 (7th Cir. 1998) (holding that "it is not enough for the plaintiff to show that her impairment prevent[s] her from performing one narrow job for one employer"); *Gilday v. Mecosta Co.*, 124 F.3d 760, 767 (6th Cir. 1997) ("The inability to perform a particular job or the job of one's choice is not a disability."). Moreover, she must show more than an inability to perform a narrow range of jobs. *See McKay v. Toyota Motor Mfg.*, 110 F.3d 369, 373 (6th Cir. 1997) (Kennedy, J., concurring) (refusing to find plaintiff

substantially limited in major life activity of working where evidence showed only that she was precluded from a narrow range of jobs). Rather, Williams must demonstrate that her impairment significantly restricted her from performing "either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities." 29 CFR § 1630.2(j)(3)(i). In light of this standard, Williams has failed to produce sufficient evidence to allow a rational juror to conclude, by a preponderance of the evidence, that she is substantially limited in the major life activity of working.

Other than her claimed inability to perform the essential functions of the body paint inspection process, Williams has offered the testimony of Dr. William J. Weikel, Ph.D., a vocational expert from Morehead, Kentucky, in an attempt to show that her impairment substantially limited her major life activity of working. Dr. Weikel's report states that because of her condition, the number of jobs in the economy that Williams can perform has been reduced by 50% to 55%. (Plaintiff's Motion for Partial Summary Judgment, at 16). By way of explanation, Dr. Weikel attributed 40% to Williams' inability to perform medium duty work, and the remaining 10% to 15% to her loss of access to light duty jobs in the economy. Although this is more evidence than the Plaintiff has produced with respect to her other major life activities, it is still inadequate.[4]

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[4] Plaintiff also maintains that the working restrictions imposed by Dr. Kleinert restricted her ability to work. While this may be so, Plaintiff has not so shown. In her motion for partial summary judgment, she merely states that "she cannot perform the class of factory jobs that violates [sic] her restrictions." Such conclusory statements are not sufficient, in and of themselves, to satisfy a claimant's burden to show that she is restricted in her ability to perform either a class of jobs or a broad range of jobs in various classes. *See Mendoza v. Borden*, 158 F.3d 1171, 1175 (11th Cir. 1998)(holding that plaintiff "presented no evidence to show that she cannot perform a broad range or class of jobs; instead, she simply makes the vague assertion that she is unable to perform any job that [requires her to lift more than seven pounds] . . . .").

Dr. Weikel's report is insufficient for several reasons. First, Dr. Weikel based his report, primarily, on Plaintiff's past medical records, some of which were dated well after TMMK's alleged refusal to accommodate her needs in the Fall of 1996.[5] Because determining whether an individual is disabled requires examination of the claimant's condition at the time of the challenged discriminatory action, *see Kocsis v. Multi-Care Management*, 97 F.3d 876, 884 (6th Cir. 1996), the referenced reports relied upon by Dr. Weikel significantly impair the accuracy of his diagnosis.

More importantly however, Dr. Weikel's report does not conform itself to the appropriate standard. The accompanying regulations make a plaintiff's burden clear: she must show, by a preponderance of the evidence, that her impairment significantly restricts her from performing "either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities." 29 CFR § 1630.2(j)(3)(i). In conjunction with this standard, the regulations set forth a detailed set of factors designed to facilitate a claimant's burden in this area. As referenced above, these factors include: (1) the geographical area to which the individual has reasonable access; (2) the job from which the individual has been disqualified because of an impairment, and the number and types of jobs utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (class of jobs); and/or (3) the job from which the individual has been disqualified because of an impairment, and the number and types of other jobs not utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (broad range of jobs in various classes). *See* § 1630.2(j)(3)(ii)(A)-(C).[6]

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[5] For example, Dr. Weikel's report includes two reports by Dr. Mark Smith that are dated February 19, 1997 and July 15, 1997.

[6] While reliance on the factors set forth in § 1630.2(j)(3)(ii)(A)-(C) is not mandatory, the Court can find no

From these factors, at least one thing is clear: determination of whether one is substantially limited in the major life activity of working requires an examination, and therefore evidence, of a claimant's ability, or inability, to access the job market *in her own geographical area*. First, the record, including Dr. Weikel's report, makes no reference to the geographical area to which Williams has reasonable access. Secondly, to say, as Dr. Weikel's report does, that the number of *jobs in the economy* that Williams could perform was reduced by 50%, offers no assistance in evaluating her true employability within *her own geographical area*. Nowhere does Dr. Weikel's report indicate the "number and types of jobs utilizing similar training, knowledge or abilities, within [Plaintiff's] geographical area, from which [she] is also disqualified because of [her] impairment." Nor does his report contain evidence indicating "the number and types of other jobs not utilizing similar training, knowledge, skills, or abilities, within [Plaintiff's] geographical area, from which [she] is also disqualified because of [her] impairment." Absent some kind of evidentiary showing comporting with these criteria, Plaintiff cannot show that she is substantially limited in the major life activity of working. *See e.g., Skorup v. Modern Door Corp.*, 153 F.3d 512, 515 (7th Cir. 1999); *Swain v. Hillsborough Co. School Bd.*, 146 F.3d 855, 858 (11th Cir. 1998)(granting defendant's motion for summary judgment because of plaintiff's failure to provide evidence per

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reason not to follow them in this case. This is especially true in light of the overall difficulty in determining a claimant's inability to perform either a class of jobs or a broad range of jobs in various classes. Reliance is also proper in light of the Supreme Court's apparent willingness to use administrative regulations in construing the ADA. *See e.g., Bragdon v. Abbott*, 118 S.Ct. 2196 (1998). The Court is confident that reliance on the regulatory factors will neither surprise nor disadvantage either party. For example, Plaintiff's reply to Defendant's response to her motion for partial summary judgment includes the following statement: "This Court must apply the guidelines and factors found in the federal regulations to the specific facts of this case to determine if Ms. Williams is disabled."

§ 1630.2(j)(3)(ii)(A)-(C)); *Thompson v. Holy Family Hosp.*, 121 F.3d 537, 540 (9th Cir. 1997); *Bolton v. Scrivner, Inc.*, 36 F.3d 939, 944 (10th Cir. 1994); *Jasany v. United States Postal Serv.*, 775 F.2d 1244, 1249 (6th Cir. 1985).[7]

Finally, in *McKay v. Toyota Motor Mfg.*, 110 F.3d 369 (6th Cir. 1997), the Sixth Circuit, presented with vocational evidence nearly identical to those contained in Dr. Weikel's report, declined to find that plaintiff, a former production line employee of TMMK, was substantially limited in her ability to work. In *McKay*, the plaintiff was working modified duty with several job restrictions similar to Williams' when her employment was terminated.[8] In the ADA based lawsuit that followed, McKay produced expert testimony compelling a finding that she was "significantly restricted in her ability to perform any medium or heavy work." *Id.* at 373. However, that same expert admitted that McKay's position with TMMK never required that she perform medium or heavy work. In finding that McKay was not substantially limited in the major life activity of working, the Court stated:

> Since plaintiff's work history at Toyota involved only light work, and she made no showing that she ever was able to perform medium or heavy work, one is hard pressed to comprehend how she could have been regarded as a "qualified individual" with respect to medium and heavy work.

Id. Not only has Williams admitted that her positions with TMMK never required her to perform medium duty work, she also admits the absence of medium duty work from her

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[7] Citing cases from both the Fifth and Eighth circuits, the Court in *Swain*, stated that "[a]lthough a plaintiff seeking recovery under the ADA is not required to provide a comprehensive list of jobs which she cannot perform, the person must provide some evidence beyond the mere existence and impact of a physical impairment to survive summary judgment." *Swain*, 146 F.3d at 858.

[8] McKay's working restrictions included the following: maximum lifting of twenty pounds; no vibrating tools; and no repetitive use of her right hand. *McKay*, 110 F.3d at 371.

entire work history. Like the Court in *McKay*, this Court is unable to see how Williams could be considered a "qualified individual"[9] with respect to medium and heavy duty work.[10] Accordingly, Plaintiff has failed to show that she suffers from a physical impairment that substantially limits a major life activity.

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[9] The Court is aware that the phrase "otherwise qualified" is not typically a part of the "disability" inquiry. Rather, it comes into play later when deciding whether one, already determined to be disabled, can perform the essential functions of a job with or without a reasonable accommodation. As used in *McKay*, this Court can only assume that the Court of Appeals was either referring to the larger phrase commonly used in an ADA analysis, an "otherwise qualified individual with a disability," or simply jumped-the-gun and moved forward to the "otherwise qualified" inquiry without notice. The distinction, however, is meaningless as a plaintiff's prima facie case requires a showing of both a disability and that she was otherwise qualified.

[10] The expert in *McKay* also testified that "there were a broad range of jobs that [plaintiff] could perform." *Id.* at 373. Likewise, in his report Dr. Weikel's states that it is his belief that Plaintiff "could return to the paint inspection job at Toyota . . . if these jobs were available to her." In fact, throughout the relevant time period, Fall of 1996, Williams' suggested reasonable accommodation was to be reassigned to the paint inspection and assembly jobs that she performed without difficulty prior to being cross-trained on the body shop inspection job. While the ability of a claimant to perform one job does not necessarily translate into the conclusion that she is not substantially restricted in her ability to work, courts have suggested that such a fact is at least a relevant consideration. *See e.g., Standard v. A.B.E.L. Services, Inc.*, 1998 WL 834520, *7 (11th Cir. (Ga.))(because plaintiff admitted that he was fully capable of performing his job at all times, he cannot be considered disabled); *Skorup v. Modern Door Corp.*, 153 F.3d 512 (7th Cir. 1998); *Dutcher v. Ingalls Shipbuilding*, 53 F.3d 723, 727 (5th Cir. 1995)(holding that the "inability to perform one aspect of a job while retaining the ability to perform the work in general does not amount to substantial limitation of the activity of working").

(2) Plaintiff's Status as an Individual with a Disability; §12102(2)(B)

Williams has failed to show that during the Fall of 1996 she was suffering from a physical impairment that substantially limited a major life activity. However, under § 12102(2)(B), she may still qualify as an individual with a disability if she can point to a record revealing an impairment that would substantially limit a major life activity.[11] In part, this definition was designed "to ensure that people are not discriminated against because of a history of disability." 29 CFR pt. 1630, App. p. 349. The definition is met if a claimant can show employer reliance on a record that "indicates that the individual has or has had a substantially limiting impairment." *Id.* In other words, a record must reveal more than some past physical or mental impairment; it must show an impairment that would qualify under § 12102(2)(A). Because Plaintiff has pointed to no such document, she cannot attain disabled status through this provision of the ADA's definition of disability.

In support of her claim under § 12102(2)(B), Williams' motion for partial summary judgment states that "Toyota's IHS records all show that Ms. Williams has [an] impairment." Furthermore, she claims that her "workers' compensation records also show [her] to be substantially disabled."[12] Neither of these assertions, however, lend

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[11] With regard to becoming an individual with a disability under § 12102(2)(B) and (C), Williams has not pointed to any particular major life activities other than the ones discussed under the § 12102(2)(A) analysis above. Consequently, the Court assumes she is intending to keep the same major life activities that were mentioned earlier, i.e., manual tasks, housework, gardening, playing with her children, lifting and working.

[12] Williams also notes that her name was on a list of "placed people" because TMMK knew she had problems with her upper extremities, shoulders, arms and wrists. However, she does not suggests that this list contained a description of her physical impairments themselves. As a result, this evidence is more appropriate for her claim under § 12102(2)(C), that she was

credence to the proposition that TMMK relied on any record reflecting a § 12102(2)(A) disability. First, Williams has failed to direct the Court's attention to single individual piece of paper that would satisfy her claim. Rather she makes a broad reference to "Toyota's IHS records." Even if her alleged pool of records were narrowed, there is nothing to suggests that any of Toyota's IHS records indicate any impairments, physical or mental, that were not taken into account under the 12102(2)(A) analysis above. Moreover, Williams fails to suggests any reliance by TMMK on the IHS records. Finally, reference to Plaintiff's workers' compensation records, by itself, is also insufficient in that it too fails to mention any impairments that were not taken into account under the § 12102(2)(A) analysis above.[13]

(3) Plaintiff's Status as an Individual with a Disability; § 12102(2)(C)

Williams' also contends that she is an individual with a disability under § 12102(2)(C). That section encompasses within the protection of the ADA individuals who are regarded as having an impairment that substantially limits a major life activity. The accompanying regulations identify three methods by which an individual may satisfy this third definition of disability:

> (1) The individual may have an impairment which is not substantially limiting but is perceived by the employer or other covered entity as constituting a substantially limiting impairment;

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perceived or regarded as an individual with a disability, and is considered below.

13 According to the EEOC, "[t]he fact that an individual . . . is classified as disabled for other purposes does not guarantee that the individual will satisfy the definition of 'disability' under [§ 12102(2)(B)]." This is because other statutes or programs, including workers' compensation "may have a definition of 'disability' that is not the same as the definition set forth in the ADA." 29 CFR pt. 1630, App. p. 349.

> (2) The individual may have an impairment which is only substantially limiting because of the attitudes of others toward the impairment; or
>
> (3) The individual may have no impairment at all but is regarded by the employer or other covered entity as having a substantially limiting impairment.

29 CFR pt. 1630, App. p. 350.

As an alternative to § 12102(2)(A), Williams claims coverage under the above first method. The thrust of her claim centers around both the settlement and results of Williams' prior workers' compensation claim and her subsequent 1993 ADA claim against TMMK. Specifically, she points out that her workers' compensation claim with TMMK was settled and that she agreed to accept temporary weekly payments based on a 20% permanent occupational disability. Upon returning to work, however, she was disappointed in how TMMK dealt with her then imposed medical restrictions. Although she pursued an ADA claim, that too was settled, and Williams returned to work at Toyota in December of 1993. It was at this time that she was assigned to a team in QCIO. Williams appears to be claiming that upon settling her workers' compensation claim, TMMK regarded her as being at least 20% disabled. In addition, she claims that when she returned to work at TMMK her name was put on a list of "placed people" with physical problems who, according to Williams, were regarded by TMMK as suffering from a disability.

Satisfaction of § 12102(2)(C) turns on the employer's perception of the employee and, therefore, involves matters of intent rather than whether or not the claimant actually suffers from a disability. *See Colwell v. Suffolk Co. Police Dept.*, 158 F.3d 635, 645 (2nd Cir. 1998). However, an employer's awareness of some sort of impairment is not enough. Instead, a plaintiff must show that her employer perceived her as having an impairment that qualifies as a disability under § 12102(2)(A). That is, the Plaintiff must allege that her employer actually perceived her as having an

impairment that substantially limited one or more major life activities. *See Kocsis v. Multi-Care Management, Inc.*, 97 F.3d 876, 885 (6th Cir. 1996). Plaintiff has failed to aver sufficient evidence that could lead a reasonable juror to believe she was regarded by her employer as an individual with a disability.

That TMMK agreed to pay Plaintiff weekly benefits based on a 20% permanent occupational disability as a part of her workers' compensation settlement, falls far short of proving that TMMK regarded Williams as suffering an impairment that substantially limited one of her major life activities, presumably that of working.[14] Certainly, this fact sheds no light on whether TMMK regarded Williams' condition as substantially limiting any other major life activity. Moreover, examination of the settlement agreement reveals the following sentence: "The parties agree that there remains a dispute as to causation as well as extent and duration of disability, *if any*." (Emphasis added). This sentence clearly shows TMMK's disagreement with Plaintiff's alleged physical condition. Rather than being an instrument reflecting Defendant's perception of Williams as one with a disability, the settlement agreement is no more than a document indicating the presence of two adverse parties coming together to enter into some sort of compromise. Certainly more is required of a plaintiff before this Court will find standing under § 12102(2)(C).

Similarly, despite her allegations that she was put on a list of "placed people," Williams has not annunciated how that

---

[14] Although it is assumed that, with respect to § 12101(2)(C), Williams' primary claim is that TMMK regarded her as suffering from an impairment that substantially limited her major life activity of working, the Court's analysis encompasses all major life activities included under the § 12102(2)(A) analysis above. It is interesting to note that while Williams asserts that TMMK regarded her as suffering from an impairment that substantially limited her ability to work, her primary complaint in this lawsuit is that TMMK "forced" her to perform duties that she insisted were beyond her capabilities.

evidence tends to support her claim that TMMK regarded her as suffering from a disability. The mere fact that an employer is aware of or documents an employee's impairment(s) is not, in and of itself, enough to show that the employer believed that the impairment substantially limited a major life activity. *See Skorup v. Modern Door Corp.*, 153 F.3d 512 (7th Cir. 1998); *Kocsis v. Multi-Care Management, Inc.*, 97 F.3d 976 (6th Cir. 1996). If it is Williams' contention that TMMK used this list to ensure employee placement that would not conflict with their working restriction—conduct usually deemed a reasonable accommodation and required of an employer under the ADA—it would not amount to being regarded as an employee with a disability under §12102(2)(C). *See Byrne v. Board of Education*, 979 F.2d 560, 567 (7th Cir. 1992)(holding that "an employer does not necessarily regard an employee as [disabled] simply by finding the employee to be incapable of satisfying the singular demands of a particular job"); *Welsh v. City of Tulsa, Okl.*, 977 F.2d 1415, 1419 (10th Cir. 1992)(same).

B. Plaintiff's Termination.

Having determined that Williams suffered from no disability at the time TMMK allegedly refused to accommodate her, attention is turned to her eventual termination in January of 1997. Because Plaintiff has charged that TMMK terminated her employment in violation of Title I of the ADA, it is necessary that she aver, by a preponderance of the evidence, a prima facie case of discrimination as to TMMK's termination of her employment. Again, constructing a prima facie case requires Plaintiff to show that—(1) she is an individual with a disability; (2) she is otherwise qualified for the job; and (3) that the defendant either refused to make a reasonable accommodation for her disability or made an adverse employment decision regarding her solely because of her disability. *See Smith v. Ameritech*, 129 F.3d 857, 866 (6th Cir. 1997). Because Williams cannot show that she was an otherwise qualified individual, this claim too must fail.

For purposes of this analysis, the Court will assume that Williams, in January of 1997, was suffering from a cognizable disability under the ADA. She must still show, however, that she was a qualified individual with a disability at that time. *See Griffith v. Wal-Mart Stores Inc.*, 135 F.3d 376, 380 (6th Cir. 1998)(holding that a claimant must show that she is an otherwise qualified individual at the time of the challenged adverse employment decision). Thus, she bears the burden of demonstrating that she was an individual with a disability who, with or without reasonable accommodation, [could have] perform[ed] the essential functions of [her] employment position" with Defendant. 29 U.S.C. § 12111(8). A plaintiff who cannot perform the essential functions of her job, with or without reasonable accommodations, is not an otherwise qualified individual under the ADA, *see Tuck v. Health Services of Tennessee, Inc.*, 7 F.3d 465, 471 (6th Cir. 1993), and cannot seek the protections therein.

There can be no question that, at least without a reasonable accommodation, Williams was unable to perform the essential functions of her job in January of 1997. On December 6, 1996, one of Williams' treating physicians placed her under a *no work of any kind restriction.* According to Plaintiff's own testimony, this restriction meant exactly that: she was unable to perform any work at all for her employer or anyone else. The full extent of this restriction was squarely addressed in her deposition:

> Q: And I guess you explained it earlier, but just for my edification here again, no work means that, it's self-explanatory; you're not supposed to work at all until you're well; is that correct?
>
> WILLIAMS: That's correct.[15]

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[15] In her response to Defendant's motion for summary judgment, Plaintiff argues that the interpretation of the no work of any kind restriction constitutes a genuine material issue of fact precluding summary judgment. She states:

> Finally, there is an unresolved factual issue concerning whether Ms. Williams' "no work" restriction would have prevented her from doing no work at all. Frankly, Ms. Williams' counsel is unclear as to the scope of the "no work" restriction. It is unknown whether that restriction applies to any work of any nature or whether the restriction was put in effect because the doctors understood that part of Ms. Williams' work was the performance of the [body shop inspection] job. This is an unresolved matter which also would prevent a summary judgment being issued as requested by Toyota. The record is silent as to the extent of Ms. Williams' restriction and whether her disabilities could have been accommodated within the restrictions.

(Plaintiff's Memorandum in Response to Defendant's Motion for Summary Judgment, at 10-11). However, Plaintiff's counsel seems to ignore the testimony given by Williams' in her deposition and quoted in the body of this Opinion. In addition to the portion of her testimony related above, Williams' deposition also contains the following unequivocal statement:

> Q: And at the present time you have restrictions against doing any work of any kind; is that correct?
>
> WILLIAMS: Yes.

(Williams Deposition Volume I, at 7). Finally, towards the end of her deposition, the following exchange takes place:

> Q: Seeing that you're on a no-work restriction and have been since December of 1996, you haven't been able to apply for other employment, have you?
>
> WILLIAMS: No.
>
> Q: Not even office jobs or anything; correct?
>
> WILLIAMS: No.

(Williams Deposition Volume I, at 151).

included her duties in body shop inspection or were limited to her original position performing in assembly and paint inspection. *See Weiler v. Household Finance Corp.*, 101 F.3d 519, 525 (11th Cir. 1996) (finding that plaintiff was not an otherwise qualified individual because she was under a no work of any kind restriction by a treating psychotherapist); *Bombard v. Fort Wayne Newspapers, Inc.*, 92 F.3d 560, 564 (7th Cir. 1996).

Despite the above, Williams may still be an otherwise qualified individual if she can demonstrate that a reasonable accommodation on behalf of TMMK would have allowed her to perform the essential functions of her job. As a plaintiff, Williams bears the burden of proposing such an accommodation. *Smith v. Ameritec*, 129 F.3d 857, 866 (6th Cir. 1997) (claimant bears the burden of proposing a reasonable accommodation). In satisfying this requirement, Williams' only proposed reasonable accommodation was for TMMK to reassign her back to her original duties in assembly and paint inspection. While reassignment can at times amount to a reasonable accommodation under the ADA, *see* § 12111(9)(B), such is not the case in this situation. Williams' proposed accommodation of reassignment fails to address the no work of any kind restriction imposed upon Williams at the time of her termination. Having admitted that she could not perform any work at TMMK as a result of these restrictions, reassignment to assembly and/or paint inspection would not have constituted a reasonable accommodation. *See Dalton v. Subaru-Isuzu Automotive, Inc.*, 141 F.3d 667, 678 (7th Cir. 1998)(recognizing that "[t]he ADA itself tells us that it encompasses reassignment to a vacant position for which the employee is 'qualified'"); *Weiler v. Household Fin. Corp.*, 101 F.3d 519, 525-26 (11th Cir. 1996) (reassignment not a reasonable accommodation in light of plaintiff's admission that she was unable to perform any work at the time).

V. The Family and Medical Leave Act

Intentionally absent from the statement of facts above are Plaintiff's specific factual allegations comprising her claim

that Defendant interfered with her rights as protected by the FMLA. In its motion for summary judgment, TMMK argues that even assuming a violation, Williams has failed to show she has suffered any damages available under the FMLA. Defendant maintains that summary judgment is proper in this situation. In response, Plaintiff's only evidence to rebut Defendant's motion concerns statements surrounding the extent of her bodily injuries. In the alternative, Plaintiff's position seems to be that the unavailability of non-bodily injuries should not serve as grounds to grant Defendant's motion. For the reasons stated below, the Court finds Defendant's position persuasive.

The available remedies under the FMLA are expressly stated in §2617. That section provides that an employer who violates the Act is liable for "damages equal to the amount of any wages, salary, employment benefits, or other compensation denied or lost to such employee by reason of the violation." 29 U.S.C. §2617(a)(l)(A)(i)(I). Plaintiff's claim for bodily injury is not a wage, salary, or employment benefit, and several courts have held, and this Court agrees, that the phrase "other compensation" requires "some type of quid pro quo exchange between an employer and its employee." *McAnnally v. WYN South Molded Prod., Inc.*, 912 F.Supp. 512, 513 (N.D. Ala. 1996). *See also, Vicioso v. Pisa Bros., Inc.*, 1998 WL 355415, *4 (S.D.N.Y. 1998) (following *McAnnally*). In other words, general compensatory damages arising out of a violation of the FMLA are not recoverable.[16] In fact, the Court in *Vicioso*

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16 In *McAnnally*, the Court explained:

> When the FMLA speaks of "other compensation" as a possible measurement of damages, it does so as the fourth item in a series, and the three other items include (1) wages, (2) salary, and (3) employment benefits. The terms wages, salary, and employment benefits imply some type of quid pro quo exchange between an employer and its employee. Appearing as it does with the terms wages, salary, and employment benefits, the term "other compensation" also implies some type of quid pro quo exchange between an employer and its employee. The term does not imply a

specifically rejected the idea that an employee can recover damages for bodily injury resulting from an employer's violation of the FMLA. *Id.* (holding that "injured employees may not recover for anxiety or physical injury suffered as a result of a FMLA violation").[17]

In addition to the legal remedies provided under §2617, the FMLA authorizes federal courts to grant "such equitable relief as may be appropriate, including employment, reinstatement, and promotion." §2617(a)(1)(B). Even if Williams' response to Defendant's motion for summary judgment had attempted to state that she was seeking reinstatement with TMMK, the Court would still be left unpersuaded. The record clearly indicates that on December 6, 1996 Williams was subjected to her physician's restrictions from *any work of any kind*. Furthermore, as of September 12, 1997, the date of her deposition in this case, not only was Williams still subject to, and complying with, these restrictions, but when asked was unable to give a date when she felt her restriction from working would be lifted. In light of this undisputed evidence, the Court is unable to

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reimbursement formula for "mental distress" stemming from loss of job security.

McAnnally, 912 F.Supp. at 513. This Court adopts this rationale and believes it justifies the exclusion of general compensatory damages meant to reimburse a claimant for bodily injury.

17 If an employee proves a violation of the FMLA but has suffered no reduction in wages, salary, or other employment benefits, she may still recover "any actual monetary losses sustained by the employee as a direct result of the violation, such as the costs of providing care, up to a sum equal to 12 weeks of wages or salary for the employee." §2617(a)(1)(A)(i)(II). Rights protected by the FMLA include employees' rights to seek leave from work in order to prepare for a birth, place a child into adoption, or to simply care for ones child, spouse, or parent. *See* §2612(a)(1)(A)-(C). The "actual monetary losses" available under §2617(a)(1)(A)(i)(II) are limited to those plaintiffs asserting rights protected under §2612(a)(1)(A)-(C) as opposed to someone in Williams' position who has never claimed that she has suffered an economic loss in "providing care" to a family member.

identify, and the Plaintiff has failed to show, any equitable relief that would be appropriate under these circumstances.

Nor is the Court persuaded that Plaintiff can take advantage of §2617(a)(3) which allows a court to grant, "in addition to any judgment awarded to the plaintiff, . . . reasonable attorney's fee[s], reasonable expert witness fees, and other costs of the action . . . ." At least one court has read the language of § 2617(a)(3) as providing litigation related costs only when a plaintiff is otherwise successful under §2617(a)(1), including a judgment granting affirmative or other equitable relief. *See Dawson v. Leewook Nursing Home Inc.*, 14 F.Supp.2d 828, 834 (E.D. Va. 1998)(holding that the language of §2617(a)(3) "makes it clear that the FMLA requires that attorney's fees be awarded when a violation of the Act is established, but only in addition to a judgment"). This Court agrees. In enacting the FMLA, Congress sought to redress, among other things, a perceived inadequacy of "job security for employees who have serious health conditions that prevent them from working for temporary periods." §2601(a)(4). Consequently, the primary purpose behind the FMLA is to ensure that employees are able to take off from work upon the happening of certain conditions without fear of losing any employment related benefits. *See* §2601(b). In furtherance thereof, the Act should be applied in order to strike a balance between the personal needs of employees with the legitimate business requirements of employers by maintaining, to some degree, the parties' contractual status quo during difficult times. *See id.* §2601(b)(1) and (3). To allow the Plaintiff, especially at the summary judgment stage, to proceed with her claim under the FMLA in the absence of any showing of an employment benefit related loss would be contrary to the intent behind the Act.

Once TMMK's motion for summary judgment directed the Court's attention to the lack of evidence in the record concerning Plaintiff's available remedies under the FMLA, it was Plaintiff's obligation under Rule 56(e) to set forth specific facts showing the presence of a genuine issue for

trial. Having determined that Plaintiff has failed to satisfy this burden, the Court must grant Defendant's motion for summary judgment. Other courts have so held. *See e.g.*, *Cianci v. Pettibone Corp.*, 152 F.3d 723, 729 (7th Cir. 1998) (granting defendant's motion for summary judgment where plaintiff "failed to come forth with any evidence that she has a remedy under the FMLA"); *Dawson v. Leewook Nursing Home, Inc.*, 14 F.Supp.2d 829 (E.D. Va. 1998) (same); *Settle v. S.W. Rodgers, Co., Inc.*, 998 F.Supp. 657 (E.D. Va. 1998) (granting motion to dismiss because plaintiff's failure to allege injuries cognizable under the FMLA); *Dodgens v. Kent Manufacturing Co.*, 955 F.Supp. 560 (D.S.C. 1997) (summary judgment); *Lloyd v. Wyoming Valley Health Care Sys., Inc.*, 994 F.Supp. 298 (M.D. Pa. 1998) (same).

VI. Conclusion

Accordingly, **IT IS HEREBY ORDERED AND ADJUDGED**,

1) that Defendant's motion for summary judgment [Record No. 99] is **GRANTED**;

2) that Plaintiff's motion for partial summary judgment [Record No. 103] is denied as **MOOT**;

3) that Defendant's motions in limine [Record Nos. 96 and 147] are denied as **MOOT**;

4) this action is dismissed with prejudice and shall be stricken from the docket; and

5) this is a final and appealable order.

This 22 day of January, 1999.

/s/_____
Henry R. Wilhoit, Jr., Chief Judge

[Filed January 27, 1999]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON

CIVIL ACTION NO. 97-135

ELLA WILLIAMS,
Plaintiff,

v.

TOYOTA MOTOR MANUFACTURING, KENTUCKY, INC.,
Defendant.

JUDGMENT

Consistent with the Memorandum Opinion and Order entered this date and being otherwise sufficiently advised,

IT IS HEREBY ORDERED AND ADJUDGED,

1) the Defendant's motion for summary judgment [Record No. 99] is **GRANTED**;

2) that Plaintiff's motion for partial summary judgment [Record No. 103] is denied as **MOOT**;

3) that Defendant's motions in limine [Record Nos. 96 and 147] are denied as **MOOT**;

4) this action is dismissed with prejudice and shall be stricken from the docket; and

5) this is a final and appealable order.

This 27 day of January, 1999.

/s/_____
Henry R. Wilhoit, Jr., Chief Judge

APPENDIX D

[Filed October 12, 2000]

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 99-5234

ELLA WILLIAMS,
Plaintiff-Appellant,

v.

TOYOTA MOTOR MANUFACTURING, KENTUCKY, INC.,
Defendant-Appellee.

ORDER

Before: MERRITT, BOGGS, and MOORE, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

Supreme Court, U.S.
FILED
MAR 2 2001
CLERK

No. 00-1089

IN THE

Supreme Court of the United States

TOYOTA MOTOR MANUFACTURING, KENTUCKY, INC.,

Petitioner,

v.

ELLA WILLIAMS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

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Bolton v. Scrivner, Inc., 36 F.3d 939 (10th Cir. 1994) 17

Bragdon v. Abbott, 524 U.S. 624 (1998) 1, 9, 11, 13

Broussard v. University of California, at Berkeley, 192 F.3d 1252 (9th Cir. 1999) 17

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Halperin v. Abacus Technology Corp., 128 F.3d 191 (4th Cir. 1997) 17

Hilburn v. Murata Electronics North America, Inc., 181 F.3d 1220 (11th Cir. 1999) 16

McKay v. Toyota Motor Mfg., U.S.A., Inc., 110 F.3d 369 (6th Cir. 1997) 17

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Skorup v. Modern Door Corp., 153 F.3d. 512 (7th Cir. 1998) 17

Snow v. Ridgeview Medical Center, 128 F.3d 1201 (8th Cir. 1997) 16

Standard v. A.B.E.L. Services, Inc., 161 F.3d 1318 (11th Cir. 1998) 17

Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999) 1, 7, 11, 14, 15, 19

Cited Authorities

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42 U.S.C. §§ 12101, *et seq.* 1

42 U.S.C. § 12102(2) 8, 19

42 U.S.C. § 12102(2)(A) 1

42 U.S.C. § 12102(2)(B) 8

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INTRODUCTION

The Sixth Circuit has ruled that Ella Williams is "disabled" in the major life activity of performing manual tasks without regard to whether she is disabled concerning the major life activity of working. Toyota Motor Manufacturing, Kentucky, Inc. ("Toyota") misstates the ruling of the Sixth Circuit and argues for an interpretation of the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. §§ 12101, *et seq.* which would do away with the requirement that disability determinations be made on an individual basis and would further require that all ADA claimants be disabled as concerns the major life activity of working, contrary to the established precedent of *Bragdon v. Abbott*, 524 U.S. 624 (1998) and *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999).

RELEVANT STATUTES AND REGULATIONS

42 U.S.C. § 12102(2)(A)[1] states disability[2] means "with respect to an individual–(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individuals; . . ."

29 C.F.R. § 1630.2(i) identifies major life activities such as performing manual tasks or working.

Impairments are considered to substantially limit major life activities if the individual is "Significantly restricted as

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1. Hereafter reference will be made only to the appropriate section of the ADA without reference to the Title number.

2. Only definitions of disability relevant to this case will be addressed.

to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity." 29 C.F.R. § 1630.2(j)(1)(ii).

Three factors to be considered in determining whether an impairment substantially limits a major activity are: (1) nature and severity, (2) duration, and (3) permanent or long-term impact. 29 C.F.R. § 1630.2(j)(2)(i-iii).

As concerns *only* the major life activity of working, regulations state that in order to be substantially limited, the individual must be restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person. Importantly, the regulation provides *only* as concerns working, "The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working." 29 C.F.R. § 1630.2(j)(3)(i).

The ADA, § 12112(a), prohibits discrimination against qualified individuals with disabilities because of disability in regard to terms, conditions, and privileges of employment.

§ 12111(8) provides that a qualified individual with a disability means a disabled individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.

"Reasonable accommodation" is not defined by a limiting definition but instead requires employers to accommodate disabled individuals unless to do so would constitute an "undue hardship." §§ 12111(9) and (10).

Importantly, an employer engages in prohibited discrimination when the employer fails to make reasonable accommodations to known physical or mental limitations of otherwise qualified individuals with a disability. §§ 12112(b)(5)(A).

FACTS

Ella Williams is 41 years of age, is married, and has children. She reads at the ninth grade level, and her mathematical skills are at the tenth grade level. She described her vocational background as "Production work and factory work's (sic) what I've known all my life."

She was first employed by Toyota, an automobile manufacturer, in 1990 and was able to perform her job in the paint department. Later, she was transferred to the power train group which was an assembly line job where she helped build car engines using pneumatic tools. This job caused her to develop carpal tunnel syndrome ("CTS"), and after being off work for several months, her physician returned her to work with medical restrictions on her activity.

In 1992, those restrictions were to do only light work, no lifting of more than 20 pounds occasionally and 10 pounds frequently, avoid constant repetitive use of both hands and arms, including flexion and extension of the wrists and elbows, avoid overhead work, and no use of pneumatic tools. Ms. Williams filed a workers' compensation claim against Toyota which was settled on the basis of a 20% occupational impairment.

In 1993, Ms. Williams sued Toyota under the ADA for not accommodating her disability by assigning her work she

could perform. That lawsuit was settled, and Ms. Williams returned to work at Toyota in December, 1993.

When she returned, she was assigned to quality control inspection operations in the body paint inspection group. These jobs did not require as much physical exertion as assembly line jobs and were not typical production line positions. They were the least physically demanding jobs in the plant.

There were four jobs in the new group: (1) assembly paint, (2) paint second inspection, (3) shell body audit, and (4) ED surface repair. Ms. Williams was required to perform only two of the four jobs; paint second inspection and assembly paint. These were primarily visual inspection jobs although some manual activity was required.

In the late summer or fall of 1996, Ms. Williams was asked to cross-train on the shell body audit job, and she agreed. The shell body job required her to soak a sponge in a highlight oil and wipe down part of the metal shell body of a car. A part of 450 to 500 car shell bodies had to be wiped down per shift with the allotted job time being about 58 seconds on each shell body. This job was more physically demanding than the paint inspection jobs she previously had been doing. The shell body job caused pain to her, and she sought care from Industrial Health Services, Inc. ("IHS") which is Toyota's on-site occupational medicine services provider. IHS doctors diagnosed Ms. Williams as suffering from (1) myotendonitis bilateral periscapular, an inflamation of muscles and tendons around both of her shoulder blades, (2) myotendonitis, (3) myositis bilateral forearms with nerve compression causing media nerve irritation, and (4) thoracic outlet compression which is a condition causing pain in the

nerves leading to the upper extremities. Additionally, IHS doctor David Price diagnosed her as suffering from pan myositis which is a general irritation of the trapezius, biceps, and triceps muscles. Dr. Price confirmed and continued Ms. Williams earlier medical restrictions caused by her CTS and further restricted Ms. Williams' activity by prohibiting any work above chest level, any extended reach or repetitive rotary or lateral movements of the head/neck. It was felt that Ms. Williams' problems were related to her employment.

Ms. Williams further sought treatment from Dr. Mark Smith, a board-certified orthopedic surgeon, who diagnosed her as suffering from myofacial pain caused by work. He restricted her from repetitive activity and stated that she should not be wiping highlight oil on from 450 to 500 auto shell bodies per shift because this would aggravate her condition. Ms. Williams' condition is objectively manifested by knotting and spasms of the muscles which Dr. Smith treated by trigger point injections. There also was an MRI showing peritendinitis of muscles surrounding the shoulder joint. Ms. Williams stated the shell body job caused the following symptoms:

> My shoulder starting getting some nerve–what they–it's like a tingling electricity in my arms again. My arms going to sleep, going dead at night, waking me up. My neck went to hurting me a lot. My neck just felt lazy, went to aching, and having pains in the back of my neck. My shoulders when raising my arms would seem like they were tiring out. They just–they were giving out when I would be trying to work. And at lunch every day, it got to the point to where my arms was just like going to sleep again on

> me. It'd take me an hour after we started back up working to get back to where I could do the job like I needed to.

Ms. Williams' impairment affects activities of daily living and curtails activities. She needs help in dressing herself.

She presented testimony from a vocational expert, William J. Weikel, who opined that as a result of her medical restrictions, she has lost access to 50% to 55% of the jobs in the economy.

Although Ms. Williams had been a successful Toyota employee for the three years approximately since her return in 1993, Toyota informed her that she would have to do the shell body job or be fired. She attempted to comply and thereby was injured further to the point she could not continue working. When she could not work, Toyota fired her under the guise that she had voluntarily resigned her employment by not coming to work.

DISTRICT COURT PROCEEDINGS

Toyota requested the District Court to enter a summary judgment in favor of Toyota to the effect that Ms. Williams was not "disabled." The District Court agreed and specifically held that Ms. Williams was not disabled as concerns the major life activity of performing manual tasks. The District Court's logic was that Ms. Williams' evidence of substantial limitations in performing manual tasks "are irretrievably contradicted by Plaintiff's continual insistence that she could perform the tasks in assembly and paint inspection without difficulty; positions requiring manual tasks."

SIXTH CIRCUIT PROCEEDINGS

In the Sixth Circuit, Ms. Williams advanced the proposition that she could be entitled to the protection of the ADA by proving she was disabled as concerns performing manual tasks and was not required to prove she was disabled as concerns the major life activity of working. She argued she obviously was substantially limited in the major life activity of performing manual tasks, and it was not necessary that she also prove she was disabled as concerns working. The Sixth Circuit agreed.[3]

The Sixth Circuit noted this Court in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 492 (1999) cautioned and mentioned the EEOC has found that the major life activity of working should not be considered if the individual is substantially limited in any other major life activity. App. 5a.

> In this case, the plaintiff's claim is not based solely on the difficult concept that she is disabled as to work generally, but rather, includes the rather simple concept that she is disabled as to performing manual tasks because she suffers from a severe impairment to her limbs, shoulders and neck that seriously reduces her ability to perform the manual tasks that are job-related.

Id. at 5a.

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3. The Sixth Circuit Opinion is appended to Toyota's Petition, and Ms. Williams will use the appendix pagination of the Opinion as found in Toyota's Petition when referring to the Sixth Circuit Opinion.

Therefore, having concluded that Ms. Williams is substantially limited in performing manual tasks, the Sixth Circuit saw no need to determine whether she was substantially limited as to the major life activities of lifting or of working. *Id.* at 5a. Likewise, the Sixth Circuit found it unnecessary to consider whether Ms. Williams made a satisfactory showing of being disabled under the alternate definitions of disability; § 12102(2)(B), having a record of an impairment or § 12102(2)(C), being regarded as having such an impairment. *Id.* at 6a.

The Sixth Circuit was well aware that in order for Williams to be disabled, the involved impairment must substantially limit or significantly restrict the major life activity involved. The words, *substantially limits*, were emphasized by the Sixth Circuit in its recitation of the impairment definition of disability. § 12102(2). App. 3a. It noted that the regulations require that impairments "substantially limit." *Id.* at 3a. Ms. Williams' impairment is described as "a severe impairment . . ." *Id.* at 5a. The Sixth Circuit specifically refers to the "significantly restricted" language found in the regulation and concludes that Ms. Williams suffers from an actual impairment "that substantially limits a major life activity . . ." *Id.* at 6a.

As to the District Court's finding that Ms. Williams was not disabled because she could perform some manual tasks, the Sixth Circuit said.

> The fact that Williams can perform a range of isolated, non-repetitive manual tasks performed over a short period of time, such as tending to her personal hygiene or carrying out personal or household chores, does not effect (sic, should be affect) a determination that her impairment substantially limits her ability to perform the range of manual tasks associated with an assembly line job.

Id. at 4a, parenthetical statement added.

This is consistent with the holding of *Bragdon* that "The Act addresses substantial limitations on major life activities, not utter inabilities." *Id.* at 641. An individual does not have to be totally disabled before he is entitled to the protection of the ADA.

The Sixth Circuit was concerned as to whether substantial impairment in the major life activity of performing manual tasks is sufficient to invoke the protection of the ADA without reference to whether that impairment affected working. Therefore, the Sixth Circuit required that Ms. Williams demonstrate her performing manual tasks disability "affects" her work. *Id.* at 4a and 6a.

Of course, it is obvious that an individual with Ms. Williams' restrictions will be affected in factory, production or other employment requiring repetitive manual tasks. It is appropriate that the impairment claimed always "affect" or be related to employment because this application of the ADA only relates to employment. § 12112(a). The ADA does not prohibit disability discrimination in social settings, and the Sixth Circuit takes care to emphasize that when disability is based upon a substantial impairment in a major life activity other than working, then there still must be a work or employment connection or "affect" between the non-working disability and the employment. This is the requirement of § 12112(a).

At no place does the Sixth Circuit suggest that an ADA disability exists simply because work is "affected" without regard to whether the impairment constitutes a substantial limitation of the major life activity of performing manual tasks.

The Sixth Circuit dissent deserves mention because it is the blueprint for Toyota's Petition herein.

This dissent mistakenly characterizes Ms. Williams' functional limitations as being a subset of abilities related to working. *Id.* at 11a.

Certainly, this is true, but the description is not complete. The limitations affect activities of daily living, and there was no attempt by Toyota to prove Ms. Williams was not substantially limited in performing manual tasks as compared to the general population.

The dissent asserts the majority opinion "conflates (and erodes)" the standards for demonstrating substantial limits on working and on performing manual tasks.

> Williams has not shown a substantial limitation in working, because the inability to perform a single, particular job is not a substantial limitation, and she has not demonstrated that there is a broader class of jobs from which her impairment disqualifies her. Nor has Williams shown a substantial limitation in performing manual tasks, because her limitation is mostly confined to a subset of job-specific tasks.

Id. at 11a.

Aside from the erroneous statement that no evidence was furnished as to disqualification for a broad range of jobs, William J. Weikel says loss of access to 50% to 55% of jobs; ironically the dissent conflates the requirements to be disabled for performing manual tasks by simultaneously requiring substantial limitation in the major life activity of working.

The dissent says there is no performing manual tasks disability because Ms. Williams' limitation is only for a subset of job-specific tasks which is contrary to the record. Hence, the dissent would say a more substantial limitation in working is necessary before an ADA disability can be found in a major life activity other than working. In other words, all impairments must constitute a substantial limitation in working before these non-working impairments can be the basis of an ADA impairment.

This is simply the wrong analysis; *Bragdon*, *Id.* at 631. Also, the consideration of the major life activity of working prior to or at lease in conjunction with consideration of other major life activities such as performing manual tasks is incorrect. *Sutton*, *Id.* at 492. Impairment in major life activities other than working should be considered first.

Finally, the Sixth Circuit rules Ms. Williams is disabled as defined by the ADA and returns the case to the District Court for trial only on the issue of whether Toyota failed to reasonably accommodate her disability. App. 6-7a.

TOYOTA'S PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED.

I.

Toyota's Petition claims the question presented is whether individuals whose impairments preclude them from performing only a narrow category of tasks associated with specific jobs are entitled to ADA protection. Petition, p. 1.

Although not presented as separate questions, Toyota also contends the Sixth Circuit committed serious error (1) by ignoring statutory and regulatory requirements that the impairment substantially limit a major life activity and (2) by violating what is incorrectly stated to be an almost universal rule that an inability to perform a single particular job is not entitled to ADA protection, regardless of the major life activity involved.

Toyota misstates the holding of the Sixth Circuit when Toyota contends the Sixth Circuit found ADA disability based solely upon an impairment from performing only a limited number of tasks associated with a specific job. Instead, the Sixth Circuit found a substantial limitation of the major life activity of performing manual tasks which was evidenced by Ms. Williams' inability to perform the physical functions required by her particular job. The major life activity of working was not involved, and Toyota's contention only has relevance when one is considering the major life activity of working.

The Sixth Circuit did not lower the standard of determining an ADA disability from one which requires that the impairment substantially limit a major life activity to one where it is required only that the impairment only "affect" a major life activity.

Instead, the Sixth Circuit held that regardless of what the major life activity was, the impairment must substantially limit that major life activity, and further, if the major life activity is one other than working, there must be a connection between the substantially limited major life activity and working; i.e., the impaired life activity must "affect" work.

Toyota misstates the law when it claims that all Courts have held the inability to perform a single particular job does not constitute an ADA disability, *regardless of the major life activity being considered.*

Toyota's Petition, p. 3, misstates the Sixth Circuit holding to be that even though Ms. Williams could perform a broad range of manual tasks, she is disabled because " 'her impairment substantially limits her ability to perform the range of manual tasks associated with *an* assembly line job.' *Id.* at 4a. (emphasis added)." Toyota's quoted language is taken out of context because the Sixth Circuit in the first part of the sentence partially quoted by Toyota is simply noting that the mere fact Williams can perform a range of isolated, non-repetitive manual tasks is not relevant to determination of whether she is ADA disabled. Of course, this is the holding of *Bragdon v. Abbott*, 524 U.S. 624 (1998) which specifically holds that in order for a substantial limitation to exist, it need not be complete or insurmountable, only significant. *Bragdon*, *Id.* at 641.

Toyota misstates the Sixth Circuit holding to be, "that Williams could demonstrate a *substantial limitation* on her ability to perform manual tasks by simply showing that her impairment 'affected' her ability to work–even if the impairment did not otherwise substantially limit her in the major life activity of working." Petition p. 7. The Sixth

Circuit held that in order for Ms. Williams to be disabled as concerns performing manual tasks, she must be substantially limited in performing manual tasks. In fact she did not have to be substantially limited in working, and the Sixth Circuit never considered whether she was substantially limited in working. Only Toyota believes one has to be disabled for working before there can be disability in another major life activity.

This is an important and perhaps subtle point. Individuals can be disabled as concerns major life activities other than working. In such cases, it is necessary that there be a causal link or nexus between the non-working disability and the employment before ADA protection attaches because the ADA only prohibits discrimination in employment. In fact, Toyota is arguing here that unless the impairment, whatever it might be, substantially limits the major activity of working instead of merely "affecting" the major life activity of working, there can be no disability. To follow Toyota's reasoning to its logical conclusion is to say that any disability which does not constitute a substantial limitation on the major life activity of working, but instead, merely affects working, is not entitled to protection under the ADA. The end result, if Toyota's reasoning is adopted, is that the only major life activity which can constitute an ADA disability is the major life activity of working.

Needless to say, Toyota's contentions are wrong and have been expressly rejected not only in the regulations but in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 492 (1999).

To the extent Toyota contends that it is legally established that CTS or like impairments cannot constitute ADA disabilities, such a contention is incorrect. This is

because each disability determination is made on an individualized basis. *Sutton*, *Id.* at 483. Section 12102(2) notes that disability is determined "with respect to an individual." CTS has been determined to be an impairment creating an ADA disability. *Quint v. A.E. Staley Mfg. Co.*, 172 F.3d 1 (1st Cir. 1999) and *Cravens v. Blue Cross And Blue Shield*, 214 F.3d 1011 (8th Cir. 2000).

Toyota's citation of case precedents does not support its contentions in this case. This is because the cited cases deal with individualized disability determinations which cannot be mechanically applied to individuals other than those involved in the particular cases. Additionally, Toyota is not sensitive to the major life activity at issue which is performing manual tasks.

At page 10 of the Petition Toyota relies upon *Chanda v. Engelhard/ICC*, 234 F.3d 1219 (11th Cir. 2000). In that case the claimant, a professional engineer was employed as a quality control technician which required cutting honeycomb-board with a utility knife and using a metal scraper to obtain test samples. He developed mysositis which is an inflamation of the wrist and forearm occurring on the right arm. He was discharged because he could not perform the cutting function of his job. He claimed a limitation on the major life activity of performing manual tasks including turning handles, grasping, holding or lifting objections, using a computer or writing with a pen. Yet, he could attend school and take classes which required the taking of notes, could perform the functions of a quality control engineer, which involved writing and computer use, and was able to conduct the activities of daily living. This evidence was held to not create an issue of whether Chanda was substantially limited in performing manual tasks. Interestingly, the instant case

is discussed in *Chanda* which notes that "the case-by case nature of the disability determination" makes the facts of the instant case distinguishable from *Chanda*. *Id.* at 1224. In fact, *Chanda* supports the Sixth Circuit result in this case by noting how severe Ms. Williams' impairment is.

At page 10 of Toyota's Petition, it cites *Hilburn v. Murata Electronics North America, Inc.*, 181 F.3d 1220 (11th Cir. 1999) in which the claimant stated that the only thing she was told that she could not do was lifting and she never identified specifically or by class any major tasks which she was unable to perform. *Id.* at 1228. In other words, this is a case where *no evidence* of impairment was presented.

At page 10 of the Petition, Toyota relies upon *Snow v. Ridgeview Medical Center*, 128 F.3d 1201 (8th Cir. 1997). This is also a "no evidence" case, "appellant has presented no evidence . . ." *Id.* at 1207.

At page 15 of the Petition, Toyota cites numerous cases for the proposition that an inability to perform in a single, particular job does not constitute a substantial limitation in the major life activity of working. Ms. Williams agrees with this general statement and notes that this result would be required by 29 C.F.R. § 1630.2(j)(3)(i).

Ms. Williams agrees that such an inability will not suffice to prove a substantial limitation on the major life activity of working, but Ms. Williams points out that a different major life activity, performing manual tasks, is involved here, and there is not and probably could not be in a logical sense such a requirement for the major life activity of performing manual tasks.

A brief review of Toyota's cited cases shows they are not relevant to the facts of Ms. Williams case. *Colwell v. Suffolk County Police Dept.*, 158 F.3d 635, 644 (2d Cir. 1998); "Evidence was insufficient to support finding that any of the officer's impairments were substantial, . . ."; *Santiago Clemente v. Executive Airlines, Inc.*, 213 F.3d 25, 30 (1st Cir. 2000), "Impairment not shown to have substantially inferred with her performance of any of the identified major life activities."; *Olson v. General Elec. Astrospace*, 101 F.3d 947 (3d Cir. 1996), only showed limitation for a single job and claim actually was denied because no evidence showed claimant to be "regarded as disabled."; *Halperin v. Abacus Technology Corp.*, 128 F.3d 191 (4th Cir. 1997), no evidence of substantial limitation; *Dutcher v. Ingalls Shipbuilding*, 53 F.3d 723 (5th Cir. 1995), no evidence; *McKay v. Toyota Motor Mfg., U.S.A., Inc.*, 110 F.3d 369 (6th Cir. 1997) only deals with major life activity of working; *Skorup v. Modern Door Corp.*, 153 F.3d. 512 (7th Cir. 1998), Plaintiff stated she could physically perform job, no medical proof of severe restriction, and only proof of inability to perform particular job; *Gutridge v. Clure*, 153 F.3d 898 (8th Cir. 1998), claimant was computer service technician who had to lift computer equipment but could not and found other employment in a job which did not require lifting, held, no evidence of substantial limitation as to working; *Broussard v. University of California, at Berkeley*, 192 F.3d 1252 (9th Cir. 1999), no evidence of impairment as to working; *Bolton v. Scrivner, Inc.*, 36 F.3d 939 (10th Cir. 1994), no evidence presented; *Standard v. A.B.E.L. Services, Inc.*, 161 F.3d 1318 (11th Cir. 1998), no evidence presented; and *Duncan v. Washington Metro. Area Transit Authority*, 201 F.3d 482 (D.C. Cir. 2000), no evidence presented.

II.

The Sixth Circuit decision does not conflict with this Court's recent precedent concerning the ADA.

Toyota claims the Sixth Circuit has held an ADA disability may be proven simply by showing that an impairment merely "affects" a major life activity instead of the impairment being required to substantially limit or significantly restrict a major life activity, citing *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555 (1999). Petition p. 18.

As noted previously, Ms. Williams agrees that the impairment must substantially limit the major life activity, and Ms. Williams agrees that *Albertson's* so holds.

The Sixth Circuit opinion also is in conformity with this principle.

However, Toyota misstates the Sixth Circuit holding to be, "a mere effect–not a significant restriction–on the major life activity of working is enough to demonstrate a substantial limitation on performing manual tasks." Petition p. 21.

The Sixth Circuit found that Ms. Williams was substantially limited in the major life activity of performing manual tasks. The Sixth Circuit opinion does not rest on a determination of whether Ms. Williams is substantially limited in the major life activity of working. The Sixth Circuit simply required that Ms. Williams' impairment in performing manual tasks affect her work, a requirement previously embodied in § 12112(a).

III.

There is no conflict among the circuits concerning an important and recurring issue that should be decided by this Court.

Toyota notes the increasing number of repetitive stress/ trauma injuries in the workplace (Petition pp. 22-23) and advances the proposition that individuals with the same sort of impairments should not be covered under the ADA in one part of the country but covered in another. Petition p. 24.

In essence, Toyota requests that a standard be adopted on a national basis that carpal tunnel syndrome and repetitive stress injuries cannot lead to a finding of disability under the ADA. While it is easy to understand Toyota's economic motives for suggesting such a standard, such a position is flatly rejected by the statute, § 12102(2) requiring that disability be determined "with respect to an individual–. . . , and this Court's holding, widely accepted, that a disability determination be an individualized determination." *Sutton, id.* at 483.

There is no indication that the ADA is being construed in anything other than a uniform manner as it is clear the disability determination is an individualized determination to be made on a case–by–case basis.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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No. 00-1089

IN THE

Supreme Court of the United States

TOYOTA MOTOR MANUFACTURING, KENTUCKY, INC.,

Petitioner,

v.

ELLA WILLIAMS,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER[1]

1. Respondent is wrong to suggest that the sharp conflict between the decision below and those of other circuits is not a conflict at all, but the result of a "misstatement" of the Sixth Circuit's holding—a "misstatement" apparently made not only by us but by Judge Boggs in dissent as well. *See* Brief in Opposition ("Opp.") 7-14. According to respondent, there is no circuit split because the Sixth Circuit, like other courts of appeals, expressly acknowledged that an ADA plaintiff must be "substantially limited" to be disabled under the Act. That, however, is entirely beside the point. Where the court departed from its sister circuits was not in failing to recite accurately the statutory phrase "substantially limited,"

[1] Petitioner's Rule 29.6 Statement appears at Pet. ii.

but in adopting a legal principle that a plaintiff *is, in fact*, substantially limited if she cannot perform the manual tasks associated with a specific job. It is on this important and recurring question that the Sixth Circuit's decision precipitates an intolerable conflict that this Court should resolve.

Although respondent protests that it "misstates the holding of the Sixth Circuit" to say that the court "found ADA disability based solely upon an impairment from performing only a limited number of tasks associated with a specific job," Opp. 12, the court's decision could not be clearer on this point. The Sixth Circuit reasoned that respondent is "disabled as to performing manual tasks because she suffers from a severe impairment to her limbs, shoulders and neck that seriously reduces her ability to perform the manual tasks *that are job-related*." Pet. App. 5a (emphasis added). Elsewhere, the court made a "determination that [respondent's] impairment substantially limits her ability to perform the range of manual tasks associated with *an assembly line job*." Pet. App. 4a (emphasis added).

It is therefore hardly a "misstatement" that the holding of the Sixth Circuit is that an ADA plaintiff is "substantially limited" in the major life activity of performing manual tasks if she is simply precluded from accomplishing the tasks associated with a specific job. That is, in fact, how Judge Boggs in his dissent characterized the divided panel's decision, *see* Pet. App. 9a-11a, and the majority never suggested that Judge Boggs was "misstating" its holding.[2] Lest there be

[2] Respondent suggests that, by referring to an impairment "affecting" work, the Sixth Circuit was not establishing a standard for measuring whether a plaintiff is "substantially limited," but was simply clarifying that "there must be a connection between the substantially limited major life activity and working." Opp. 13. Nothing in the majority's opinion supports such a gloss; it therefore comes as no surprise that respondent cites no portion of the decision to support her novel interpretation. Moreover, such a reading makes no sense because it goes without saying that an individual with a bona fide disability has no right to an accommodation unless that disability actually hinders her ability to do her job.

any doubt about what the Sixth Circuit held, respondent concedes—even as she tries to explain what she believes was the court's actual holding—that "the Sixth Circuit found a substantial limitation of the major life activity of performing manual tasks *which was evidenced by* Ms. Williams' inability to perform the physical functions required by *her particular job*." Opp. 12 (emphasis added).

2. Respondent misses the point in arguing that the decisions from the other circuits "deal with individualized disability determinations which cannot be mechanically applied to individuals other than those involved in the particular cases." Opp. 15. Whether an ADA plaintiff is "substantially limited" by a particular impairment must be resolved on a case-by-case basis, to be sure, but the *legal principles* guiding those determinations remain constant from case to case. It is there—in delineating how a court is to measure whether a plaintiff is "substantially limited" by a given impairment—that the Sixth Circuit's decision squarely conflicts with decisions from the other courts of appeals.[3]

[3] Despite respondent's suggestions to the contrary, *see* Opp. 14, 19, we do not contend that carpal tunnel syndrome ("CTS"), as a matter of law, can never constitute a disability under the ADA. It is not difficult to imagine a case of CTS so severe that it precludes an individual from performing a broad range of manual tasks—such as brushing one's teeth, driving, and so forth—that the "average person in the general population can perform." 29 C.F.R. § 1630.2(j)(1)(i). Where the Sixth Circuit erred was in finding that an individual with CTS—or any impairment for that matter—is disabled under the Act so long as she can demonstrate that the impairment "affects" her ability to perform the manual tasks associated with her job, regardless of whether she can perform a host of other manual tasks.

Not surprisingly, while respondent goes to great lengths to distinguish her case from the facts of *Chanda* v. *Engelhard/ICC*, 234 F.3d 1219 (11th Cir. 2000), she makes absolutely no effort to reconcile the legal principle that the Eleventh Circuit articulated there with that advanced by the court below. As we describe in the petition, *see* Pet. 13-15, the *Chanda* court held that a "plaintiff must demonstrate that he is substantially limited in a *range* of manual tasks rather than a *narrow category* thereof." *Chanda*, 234 F.3d at 1223 (emphasis added). By contrast, the Sixth Circuit thought it irrelevant that respondent remained capable of performing a broad range of manual tasks both at home and at work. The reason: the ability to perform a number of manual tasks in a variety of different contexts "does not [a]ffect a determination that [respondent's] impairment substantially limits her ability to perform the range of manual tasks associated with *an assembly line job*." Pet. App. 4a (emphasis added).

Save for calling them "no evidence" cases, Opp. 16, respondent similarly overlooks without analysis the conflicting legal rules set forth in *Snow* v. *Ridgeview Medical Center*, 128 F.3d 1201, 1206-07 (8th Cir. 1997), and *Hilburn* v. *Murata Electronics North America, Inc.*, 181 F.3d 1220, 1226-28 (11th Cir. 1999). As we explain in the petition, *see* Pet. 10-13, while the court below held that an ADA plaintiff is substantially limited in a major life activity so long as her "impairments affect manual tasks associated with working," Pet. App. 6a, the *Snow* and *Hilburn* courts squarely adopt a contrary view. *See Snow*, 128 F.3d at 1207 ("It is not enough that an impairment affect a major life activity."); *Hilburn*, 181 F.3d at 1228 (impairment precluding plaintiff from performing job requiring lifting not a disability when she remained capable of performing a range of other manual tasks). These significant conflicts alone justify granting the petition. *See* S. Ct. Rule 10(a).

3. Respondent emphasizes that the major life activity of performing manual tasks is analytically distinct from the

major life activity of working and that the two should not be confused. *See* Opp. 16-17. Our point exactly. What respondent misunderstands is that it was the Sixth Circuit that failed to draw that distinction. As Judge Boggs noted in dissent, the rule that the divided panel adopted "conflates (and erodes) the standards for demonstrating a substantial limitation on 'working' and on 'performing manual tasks.' " Pet. App. 11a. Respondent herself concedes that "an inability to perform in a single, particular job does not constitute a substantial limitation in the major life activity of working." Opp. 16. And, as Judge Boggs underscored, the established rule in the other courts of appeals is that a plaintiff cannot show a "substantial limitation in performing manual tasks * * * [if] her limitation is mostly confined to a subset of job-specific tasks." Pet. App. 11a. What the decision below does, in finding coverage under the ADA when a plaintiff demonstrates no more than that "her manual disability involves a 'class' of manual activities *affecting* the ability to perform tasks at work," *id.* at 4a (emphasis added), is to confer the status of disability on impairments that do not qualify under the "working" category—because only a particular job is affected and working in general is not "substantially limited"—and also do not qualify under the "manual tasks" category—because only those tasks associated with a particular job are affected and performing manual tasks in general is not "substantially limited."

By fashioning this hybrid rule and diluting the necessary showing for a "substantial limitation" under both major life activities, the Sixth Circuit's decision legitimates an entire species of disability claims that the federal courts had heretofore universally rejected: those based on an inability to perform a single job. Therefore, as we explain in the petition, *see* Pet. 15-18, even though the Sixth Circuit's analysis focused on whether respondent was substantially limited in the major life activity of performing manual tasks, its holding

necessarily conflicts with every circuit that has addressed the major life activity of working as well.

4. Indeed, the conflict over the question presented in this case has only intensified since we filed our petition. On March 2, 2001, a majority of the D.C. Circuit, sitting en banc, reaffirmed that an individual who is precluded from "one type of job, a specialized job, or a particular job of choice," is not disabled under the ADA. *Duncan* v. *Washington Metro. Area Transit Auth.*, ___ F.3d ___, 2001 WL 201976, at *3 (en banc) (quoting *Sutton* v. *United Air Lines, Inc.*, 527 U.S. 471, 491-492 (1999)). Chief Judge Edwards, however, dissented. Adopting a view of the ADA shared by the court below, Chief Judge Edwards thought it enough that the plaintiff simply "was in a job that * * * he could not perform *because of his physical disability*." *Id.* at *9 (Edwards, C.J., dissenting) (emphasis in original). According to the dissent, therefore, where a plaintiff can no longer perform his particular job due to a physical impairment but nonetheless remains capable of performing other less strenuous jobs, the ADA mandates that the employer offer one of those less strenuous jobs to the plaintiff as a reasonable accommodation. *See id.* This recent division within the en banc D.C. Circuit underscores the broader conflict among the courts of appeals and the need for this Court to resolve it.

5. Finally, respondent does not deny that the question presented in this case is one of recurring importance. *See* Opp. 19. She concedes that there is an "increasing number of repetitive stress/trauma injuries in the workplace." *Id.* The statistics cited in the petition, *see* Pet. 22-23, and in the brief of amicus National Association of Manufacturers, *see* Br. of Amicus 15-17, confirm the proliferation of such injuries—and the lawsuits against industry that they have precipitated. Due to the conflicting decisions on the question presented in this case, employers in Kentucky, Tennessee, Ohio, and Michigan will be required to spend millions of dollars to accommodate thousands of individuals whose repetitive-

stress injuries preclude them from performing just one particular job, while employers elsewhere in the country will face no such costly mandate. It is precisely this sort of conflict among the circuits that frustrates the uniform application of national rules of law and therefore warrants resolution by this Court.

* * * *

For the foregoing reasons, and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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In The
Supreme Court of the United States
October Term, 2000

TOYOTA MOTOR MANUFACTURING,
KENTUCKY, INC.,

Petitioner,

v.

ELLA WILLIAMS,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF *AMICUS CURIAE*, NATIONAL ASSOCIATION OF MANUFACTURERS, IN SUPPORT OF THE PETITIONER

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---

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

Pursuant to Rule 37.2(b) of this Court, the National Association of Manufacturers ("NAM") by its undersigned counsel, hereby moves for leave to file its brief as an *amicus curiae* in support of Petitioner, Toyota Motor Manufacturing, Kentucky, Inc.* In support of its Motion, the NAM states:

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* Prior to filing this Motion, the NAM sought the consent of all parties to the filing of its brief, as required by Rule 37.2 of this Court. The Petitioner consented to the NAM's request. The NAM received no response from Respondent to its requests, necessitating this Motion.

The National Association of Manufacturers – "18 million people who make things in America" – is the nation's largest and oldest multi-industry trade association. The NAM represents 14,000 members (including 10,000 small and mid-sized companies) and 350 member associations serving manufacturers and employers in every industrial sector and all 50 states. Headquartered in Washington, D.C., the NAM has 11 additional offices across the country.

The NAM believes that its *amicus curiae* participation will benefit the Court in this proceeding. It provides the Court with the broad national perspective of large, medium and small businesses in a broad range of sectors that work daily to expand the economic competitiveness of business enterprises, and enhance their ability to expand opportunities and improve living standards for working Americans. Many of the NAM's members operate in multiple jurisdictions and federal judicial circuits. It is illogical, unfair and inappropriate for similarly-situated individuals and business enterprises to face drastically differing legal standards in the interpretation of federal law, depending upon their geographic location. Accordingly, the NAM and its members have a strong interest in securing the resolution of conflicting lower court interpretations of an important statutory question that has spawned much litigation in federal courts and agencies.

WHEREFORE, the National Association of Manufacturers respectfully requests that the Court grant its motion and permit it to file the accompanying brief as an *amicus curiae* in support of the Petitioner.

Respectfully submitted,

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March 5, 2001

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S.Rep. No. 101–116, at 22 (1989) 10

OTHER AUTHORITIES:

1998 JUDICIAL BUSINESS, United States Federal Judiciary, published at http://www.uscourts.gov/dirrpt98/judbus.pdf.....17

B. Mahoney *et al.*, Implementing Delay Reduction and Delay Prevention Programs in Urban Trial Courts: Preliminary Findings, Vol. 8 (1985). 18

Cumulative ADA Charge Data – Monetary Benefits from July 26, 1992 – September 30, 1999, U.S. Equal Employment Opportunity Commission, published at http://www.eeoc.gov/stats 16

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Lewis Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 COLUM. HUMAN RIGHTS L. REV. 29, 56 (Fall 1998).....18

Marika F.X. Litras, *Civil Rights Complaints in U.S. District Court, 1990-98*, (NCJ-173427).....17

NINDS Carpal Tunnel Syndrome Information Page, NATIONAL INSTITUTE OF NEUROLOGICAL DISORDERS AND STROKE, published at http://www.minds.nih.gov/health_and_medical/.....16

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---

BRIEF OF *AMICUS CURIAE*, NATIONAL ASSOCIATION OF MANUFACTURERS, IN SUPPORT OF THE PETITIONER

INTEREST OF THE *AMICUS*[1]

The National Association of Manufacturers ("NAM") – "18 million people who make things in America" – is the nation's largest and oldest multi-industry trade association. The NAM represents 14,000 members (including 10,000 small and mid-sized companies) and 350 member

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[1] The NAM hereby certifies, in accordance with Rule 37.6 of this Court, that no counsel for a party authored this brief in whole or in part, and no person or entity, other than the NAM, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief.

associations serving manufacturers and employers in every industrial sector and all 50 states. Headquartered in Washington, D.C., the NAM has 11 additional offices across the country.

The NAM has a significant interest in the questions presented in this case. Its members operate a vast number of production facilities across the United States, with employees performing work assignments of various kinds that require a variety of capabilities and skills. It is essential to such operations that businesses have a clear comprehension of the critical legal standards that govern their flexibility in assigning work, in assessing employee performance and production skills, and in making appropriate decisions in this area. The legal standards enunciated by the appellate panel in this case differ drastically from those advanced by other federal courts. The decision below throws into question the approach of many employers in comparable fact settings, despite the fact that the actions taken by the Petitioner appear to be lawful and appropriate in other federal circuits. Clearly, with respect to an important federal statute that has produced a substantial volume of litigation, it is essential – for both multi-state employers and manufacturers that operate only one production site – that a single national standard determine the lower courts' approach to the critical legal issues involved in this proceeding.

INTRODUCTION AND SUMMARY

A divided panel of the Sixth Circuit has extended the reach of the Americans with Disabilities Act of 1990 ("ADA" or "Act"), Pub. L. No. 101-336, 104 Stat. 327, 42 U.S.C. § 12101 *et seq.*, in the workplace to individuals whose impairments, and in particular carpal tunnel syndrome, preclude them from performing only a narrow category of tasks associated *with their specific job,* but which: a) do not rise to the level of substantially limiting the

major life activity of working, and b) do not substantially limit any other major life activity except as a narrow subset of activities associated solely with the workplace. This ruling is inconsistent with the ADA itself, with the regulations of the Equal Employment Opportunity Commission ("EEOC") implementing the ADA, with recent precedents from this Court, and with decisions from other circuits.[2] If allowed to stand, it will significantly impair the ability of employers, particularly those in the manufacturing sector, to implement uniform, fair policies for their entire workforce, and will place an unreasonable burden on employers to accommodate conditions that Congress never intended the ADA to cover.

The ADA prohibits discrimination by covered entities, including private employers, against qualified individuals with a disability. *See, e.g., Sutton v. United Airlines,* 527 U.S. 471, 477 (1999). The ADA provides that no covered employer "shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job applications procedures, the hiring, advancement or discharge of employees, employee compensation, job training, and other terms, conditions and privileges of employment." 42 U.S.C. § 12112(a). A "qualified individual with a disability" is identified as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the

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[2] The disparity between the Sixth Circuit's decision in this case and the holdings of courts in other Circuits is well and fully addressed in Petitioner's Petition for a Writ of Certiorari at 9-18, and will not be reiterated by *amicus* NAM. The NAM's support of the Petition will instead focus on the conflict between the Sixth Circuit's decision and recent precedents of this Court construing the ADA, as well as the other reasons why this important and recurring question should be addressed by this Court.

employment position that such individual holds or desires." 42 U.S.C. § 12111(8).

In this case, Respondent Ella Williams was employed by Petitioner Toyota Motor Manufacturing, Kentucky, Inc. ("TMMK") as an assembly line worker. During her employment, Respondent developed bilateral carpal tunnel syndrome ("CTS") in her wrists and bilateral tendinitis in her neck and arms. This led to an accommodation whereby she was assigned to what were known as the easiest jobs at TMMK, in the Quality Control Inspection Operations ("QCIO") unit of an assembly line at its facility located in Georgetown, Kentucky. She handled two of the four QCIO jobs, and performed capably for a period of years, until TMMK instituted a policy that all QCIO workers should be cross-trained and capable of performing any of the four jobs. One of the jobs new to Respondent required her to grip a block of wood with a sponge attached and wipe down passing cars with a highlight oil, working at regular intervals with her arms at shoulder height. Thereafter, Respondent allegedly began to experience pain related to her condition and concluded that she was physically unable to perform the new job. She requested that she be reassigned exclusively to her former duties, which she has never disputed that she could continue to perform. Respondent then brought suit under the ADA claiming that she was disabled and that TMMK had failed to offer her a reasonable accommodation.[3]

The crux of this case – and the question that makes a writ of certiorari appropriate – is whether Respondent's inability to use her arms in that limited range of tasks *in a workplace*

[3] In the portion of her suit relevant to the decision below and consideration of this Petition, Respondent contended that her impairment affected the major life activities of performing manual tasks and working.

setting qualifies as a disability within the meaning of the ADA.

"Disability" is defined by the ADA as:

> [W]ith respect to an individual – (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment.

42 U.S.C. § 12202(2). At issue in this case is subsection (A), whether Respondent had an actual disability.

The District Court concluded that she did not, granting TMMK's motion for summary judgment. With respect to the major life activity of performing manual tasks, the court concluded that Respondent's claim was "irretrievably contradicted by [her] continual insistence that she could perform the tasks in assembly and paint inspection without difficulty; positions requiring manual tasks. In fact, during the relevant time period, [her] proposed reasonable accommodation was to be reassigned to assembly and paint inspection." App. 36a.[4] With respect to the major life activity of working, the court held that Respondent was required to show more than an inability to perform a single job, the job of her choice, or a narrow range of jobs, and concluded that she had failed to produce such evidence. App. 37a-38a.

Respondent appealed, and a divided panel of the Sixth Circuit reversed. App. 1a-8a. In reaching its decision, the majority purported to limit its holding to a conclusion that Respondent is substantially limited in the major life function

[4] Citation to the unreported opinion of the District Court and to the opinion of the Sixth Circuit reversing the District Court will be to the Appendix to the Petitioner's Petition for a Writ of Certiorari ("App. __").

of "performing manual tasks," as distinct from that of "working." *Id.* at 5a. To reach its conclusion, the majority reached out to this Court's recent decision in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999), to import and adapt the "class based" analysis applied in *Sutton* to the major life activity of *working*, and misapplied it. Specifically, the Sixth Circuit held that "in order to be disabled the [Respondent] must show that her manual disability involves a 'class' of manual activities *affecting* the ability to perform tasks at work." App. 5a. The court then concluded that Respondent had presented sufficient evidence that her impairments prevent her from doing tasks "associated with certain types of manual assembly line jobs . . . that require the gripping of tools and repetitive work with hands and arms extended at or above shoulder level for extended periods of time." It went on to state that "[t]he fact that Williams can perform a range of isolated, non-repetitive manual tasks performed over a short period of time, such as tending to her personal hygiene or carrying out personal or household chores, does not effect a determination that her imperilment substantially limits her ability to perform the range of manual tasks associated with *an assembly line job*." *Id.* (emphasis supplied).

The standard for proving disability set by the Sixth Circuit effectively creates a new category of major life activity by merging "performing manual tasks" with "working" in cases in which a plaintiff otherwise would not be disabled within the meaning of the ADA under a distinct analysis of either activity. Moreover, it does so by ignoring the plain language of the Act and the regulations, by improperly adapting the "class" analysis of *Sutton*, and by establishing a lesser standard than this Court has specified in its recent decisions. If allowed to stand, the decision will have disastrous repercussions by creating a hierarchy of "disability" within the workplace that will ensure that similarly situated individuals are treated differently, that

litigation over a range of conditions that impose lesser limitations explodes, and that the workplace policies of employers, especially those in the manufacturing sector, are thrown into disarray.

ARGUMENT

I. THE DECISION BELOW IS INCONSISTENT WITH THE ADA, EEOC REGULATIONS, AND SUPREME COURT PRECEDENT.

Less than two years ago, this Court decided three major cases involving disability in the workplace under the ADA: *Sutton*; *Murphy v. United Parcel Service, Inc.*, 527 U.S. 516 (1999); and *Albertson's Inc. v. Kirkingburg*, 527 U.S. 555 (1999). These cases uniformly instruct that the decision of the Sixth Circuit is simply wrong.

A. The Decision Below Is Inconsistent With The Plain Meaning Of The Act And This Court's Decision In *Sutton* As To The Reach Of The ADA.

Sutton does not lead to the inexorable conclusion drawn by the Sixth Circuit, i.e., that the ADA and the EEOC regulations dictate that a "class-based" analysis be employed for a finding of disability under the major life activity of performing manual tasks. Indeed, *Sutton* should be read so as to lead to exactly the opposite conclusion.

In *Sutton*, the Court confirmed that the ADA is to be read as a whole, and given its plain meaning. *Id.* at 481. The plain text of the statute is that an individual must be "substantially limit[ed]" in "one or more major life activities." Respondent is impaired, but *Sutton* confirms that impairment alone is not enough under the Act. *Id.* at 483.

The gloss applied to the Act by the Sixth Circuit is not consistent with the plain meaning of the ADA. Respondent was found *not* to be substantially limited in any major life activity outside of work – she is able to care for herself and

perform personal and household chores. In terms of Respondent's work, the Sixth Circuit concluded that her impairment limits her ability to perform "the range of tasks associated with *an assembly line job*." App. 4a (emphasis supplied). Accordingly, the Sixth Circuit found Respondent has shown that her disability "involves" a *class* of manual activities affecting the ability to perform tasks at work. *Id.*

Simply being unable to perform a limited range of manual functions – the ability to work with a tool grasped in the hand at shoulder height for an extended period of time – is not a disability within the plain meaning of the ADA. There is no *substantial* limitation to a *major life activity* as intended by Congress. In *Sutton*, the Court reviewed at length the origin of the congressional finding contained within the text of the ADA that 43 million Americans are disabled. The Court held that this finding "gives content to the ADA's terms, specifically the term 'disability.'" *Sutton* at 487. While *Sutton* itself involved the question of whether Congress intended to include all persons with corrected physical limitations (such as hypertension controlled by medication), the same analysis applies to the case at bar. This Court drew the logical conclusion that by using that figure, Congress intended coverage under the ADA to take a functional approach to disability, focusing on activity limitations of individuals who, relative to their age-sex group, could not conduct "usual" activities. *Id.* at 486-87. In applying a "class" analysis to manual activities and finding disabled a person with CTS (who admittedly can perform all of the usual manual tasks of living), simply because she cannot perform a narrow range of activities limited to one particular assembly line job, the Sixth Circuit stands this principle on its head.

B. The Decision Below Misapplies Section 1360.2(j) Of The Regulations And This Court's Decision In *Sutton*.

In reaching its conclusion, the Sixth Circuit states that in addition to the Act, it relies upon the EEOC's interpretation of the ADA. Although the court does not explicitly state which interpretation it relied upon, one may presume that the court intended its reference to encompass at least the definitions of "disability" and related terms found in Title 29 of the Code of Federal Regulations at section 1630.2.[5] The

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[5] Within section 1630.2, the definitions of most relevance to the decision below are "major life activities" and portions of "substantially limits," as follows:

> Major Life Activities means functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

29 C.F.R. § 1630.2(i).

> Substantially limits–
>
> (1) The term substantially limits means:
>
> ....
>
> (ii) significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.
>
> ....
>
> (3) With respect to the major life activity of working–
>
> (i) The term substantially limits means significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job

(continued)

interpretation of the EEOC as embodied in these definitions does not support the conclusion reached by the Sixth Circuit. Rather, it militates against it.

First, the definition of "major life activities" refers to the itemized activities as "functions." 29 C.F.R. § 1630.2(i). This definition, in turn, is taken directly from that utilized in the several Committee Reports that comprise the most significant part of the legislative history of the ADA.[6] Use of the term "functions" by the EEOC to describe the examples of major life activities, in turn, reflects back on Congress's "functional" approach to coverage described and relied upon by this Court in *Sutton*, as discussed above.

Further, nothing in these definitions lends any support to the notion that a "class-based" analysis is appropriate to any major life activity except "working." Exactly the opposite is true. The class-based analysis dictated by the regulations and adopted by this Court in *Sutton* is expressly limited to analysis of the major life activity of working. *See* 29 C.F.R. § 1630.2(j)(3).

Finally, by inferring a "class-based" analysis that permits a plaintiff merely to show that her manual disability involves "a 'class' of manual activities *affecting* the ability to perform tasks at work," App. 4a (emphasis supplied), the Sixth Circuit has fallen prey to at least one of the several "missteps" that this Court found necessary to correct in overturning a decision of the Ninth Circuit in *Albertson's*. *See Albertson's* at 563. In that case, the Ninth Circuit found that an individual with monocular vision was disabled,

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> does not constitute a substantial limitation in the major life activity of working. . . .

29 C.F.R. § 1630.2(j)(1) & (3).

[6] *See*, S.Rep. No. 101–116, at 22 (1989); H.R.Rep. No. 100–485, pt. II at 52, pt. III at 28 (1990).

ostensibly relying upon the EEOC's definition of "substantially limits," on the premise that the manner in which the individual sees "differs significantly" from the manner in which most people see. *Id.* at 564.

This Court concluded that the Ninth Circuit was "too quick to find a disability." *Id.* Of most direct application here, the Court found first that although the EEOC definition of "substantially limits" requires a "significant restriction," the Ninth Circuit undercut a fundamental statutory requirement by transforming "significant restriction" into "difference." *Id.* So too has the Sixth Circuit transformed the EEOC's regulation and undercut a fundamental statutory requirement by equating "affect" with "significantly restrict." Permitting a finding of disability based upon a *class* of manual activities that merely *affect* the ability to perform a limited range of particular tasks at work is, quite simply, at odds with the requirement that only impairments that "substantially limit" by "significantly restricting" a major life activity constitute disabilities under the ADA. The Act concerns itself only with disabilities that are in fact substantial. *Id.*

C. The Decision Below Places An Impermissible Gloss On The Act, Conflicts With This Court's Recent Precedents And Would Create A Hierarchy Of Plaintiffs That Congress Never Intended.

In the final analysis, as pointed out by Judge Boggs in his dissent below, the majority opinion "mistakenly takes what is here primarily a *subset* of abilities related to working, the ability to 'perform manual tasks,' and erroneously treats a partial limitation there as substantially limiting a major life activity," an effect which "conflates (and erodes) the standards for demonstrating a substantial limitation on 'working' and on 'performing manual tasks.'" App. 11a. As pointed out by Judge Boggs, "[t]hese are separate inquiries"

[citing to *McKay v. Toyota Motor Mfg., U.S.A., Inc.*, 110 F.3d 369 (6th Cir. 1997)]. *Id.*

Indeed, in a case such as this, not only is it improper to conflate the two categories of major life activity, but the *only* major life activity by which Respondent's claim of disability should be reviewed is that of "working." In this case, Respondent's physical condition did not restrict her ability to care for herself or function in any meaningful way except at work. *See* App. 4a; 34a-36a. That is, Respondent is evidently capable of performing most manual tasks, such as tying a shoe, opening a door, gripping a pen or holding a steering wheel. The only task she alleges she is restricted from performing (and can support on the record), is working for extended periods of time with her arms at shoulder height while holding a tool in her hand. There is no life setting where this manual task would be relevant to the average individual *except* working. Where the impairment alleged by a plaintiff only impacts her performance in the workplace, then the only proper analysis under the ADA is whether the impairment affects the major life activity of working even if the impairment arguably impacts another category. Any other analysis inevitably will lead to the strained constructs and "conflating" engineered by the Sixth Circuit.

This Court's decisions in *Sutton*, *supra*, and in *Murphy v. United Parcel Service, Inc.*, 527 U.S. 516 (1999), support this analysis. In *Sutton*, the individuals' eyesight impairment only affected their ability to fly commercial airplanes, and in *Murphy*, the individual's hypertension impairment only affected his ability to drive a commercial motor vehicle. Seeing is, by definition, a major life activity, and driving a vehicle in our society is arguably no less a major life activity than performing manual tasks or participating in community activities. Flying or driving a commercial vehicle for work purposes is as much a subset of both "flying/driving" and "working" as grasping a block of wood at shoulder height is a subset of both "manual tasks" and "working." Certiorari

was granted in *Sutton* and *Murphy* on the question of whether the individuals were regarded as disabled. Yet, the analysis in both cases concentrated properly and exclusively on whether the individuals were regarded as disabled under the major life activity of working. *See Sutton* at 490-94; *Murphy* at 523-25.

In each case, this Court found that the individuals in question were not disabled from the major life activity of working because their disabilities only foreclosed them from a particular job or narrow class of jobs. When the major life activity under consideration in an ADA action is that of working, the statutory phrase "substantially limits" requires, at a minimum, that plaintiffs show they are unable to work in a broad class of jobs. *See Sutton* at 491-92; *Murphy* at 523-24.

The same result should obtain in this case, and all others like it involving alleged impairments whose primary impact for individuals is on the major life activity of working. Disability cases properly are evaluated under the major life activity of working when the impairment only or primarily impacts that facet of the individual's lives, and other activities only as they relate to working. Permitting plaintiffs to construct "classes" or subsets of "major life activities" that are meaningful only in the workplace – classes that are, in reality, associated with a particular job or class of jobs – would eviscerate *Sutton* and *Murphy*. Only plaintiffs who could not find a way to categorize their impairment as a "class" of activities associated with another major life activity would be obliged to prove that they were restricted from more than one job or a narrow class of jobs.[7]

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[7] For example, in considering the disability claim of a plaintiff with a hip impairment that limited his ability to walk and climb stairs, the Third Circuit had occasion to catalogue numerous reported cases examining when difficulty walking and moving

(continued)

II. MISCLASSIFYING CTS AS A DISABILITY IN CIRCUMSTANCES SUCH AS THOSE PRESENT IN THIS CASE WILL FURTHER INUNDATE COURT DOCKETS WITH ADA CLAIMS, IMPOSING UNNECESSARY STRAINS ON EMPLOYERS, EMPLOYEES, AND THE JUDICIAL SYSTEM.

The questions raised by this case are of great consequence to employers, and those in the manufacturing sector in particular, because conditions such as those present here are reported with some frequency by workers. In some instances, recommended limitations may preclude the affected employee from performing the tasks associated with a specific job. The extent to which employers must accommodate such conditions and comparable limitations, and whether national employers will need to provide different accommodations in the Sixth Circuit than in other areas of the country, is thus of considerable and growing importance.

The ADA and this Court dictate that each individual claim of disability be evaluated on its own merits. *See, e.g., Albertson's* at 566. But it is inevitable that the Sixth Circuit's ruling, if allowed to stand uncorrected, will become known as "the CTS case," and invoked by plaintiffs for the

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equates to a significant limitation on the "major life activity" of walking. *See Kelly v. Drexel University*, 94 F.3d 102, 107-08 (3d Cir. 1996); *see also McCleary v. National Cold Storage, Inc.*, 67 F.Supp.2d 1288, 1301 (D. Kansas 1999) (same; citing *Kelly* and collecting additional cases). Most of the cases reviewed arose in the employment setting. Under the Sixth Circuit's analysis, such plaintiffs could demonstrate a disability by showing that their leg or foot impairment merely "affects" their ability to perform job-related tasks that are otherwise insufficient to show disability based on a substantial limitation to the activities of "walking" or "working."

proposition that if an individual can demonstrate that her CTS (or a similar condition) merely "affects" her "ability to perform at work," she will have made out a claim of disability under the ADA. This outcome will inundate court dockets, the EEOC and deferral agencies with ADA claims, imposing unnecessary strains on employers, employees and the judicial system.

A. The Additional Cost To Employers Of Defending Against Unnecessary Lawsuits Would Be Unduly Burdensome And Counterproductive.

Treating carpal tunnel syndrome (and comparable limitations) that only "affect" a subset of abilities related to working as a disability will dramatically increase the number of ADA lawsuits filed against well-meaning employers. The ultimate result will be that an inordinate amount of time and resources will be diverted away from broader workplace safety and health efforts and from accommodation of individuals who have disabilities that truly restrict major life activities, to defending against claims not covered by the statute.

Individual complaints of CTS are a wide-spread workplace phenomenon. An estimated 849,000 Americans visit their doctors each year complaining of CTS-like symptoms.[8]

Two facts relating to reported incidence of CTS-like symptoms are worth noting. First, many employees truly suffering from CTS and similar repetitive motion disorders are not without recourse. In most states, workers' compensation coverage provides a range of relief for such temporary and treatable injuries that arise from and in the

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[8] *Facts About Carpal Tunnel Syndrome*, AMERICAN ACADEMY OF ORTHOPEDIC SURGEONS, published at http://www.aaos.org /wordhtml/press/carpalfa.htm.

course of employment. Although common, CTS is usually a short-lived condition. Only about one percent of individuals with carpal tunnel syndrome develop permanent injury.[9] Most individuals with CTS completely recover.[10] Such short-term injuries are the types of conditions for which workers' compensation was designed.

Second, the current cost to employers can be significant. Attaching "disability" status to a common injury in circumstances in which limitations are less severe will no doubt cause defense costs to spiral out of control. Not only are lawsuits financially crippling, so too are damage awards to ADA plaintiffs. From July 26, 1992 through September 30, 1999, ADA cases filed with the Equal Employment Opportunity Commission ("EEOC") involving claims of various cumulative trauma disorders resulted in $2,735,556 being paid to 179 individuals.[11] The number of people receiving monetary benefits increased steadily throughout this period. In 1999 alone, 52 plaintiffs were awarded over half a million dollars.[12]

Presumably, such awards are restricted to actions impacting individuals whose conditions truly limit major life activities. Inappropriately classifying cases of CTS that only "affect" a subset of one's abilities that relate to working as a disability under the ADA will dramatically expand employer

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[9] *NINDS Carpal Tunnel Syndrome Information Page*, NATIONAL INSTITUTE OF NEUROLOGICAL DISORDERS AND STROKE, published at http://www.minds.nih.gov/health_and_medical/disorders/carpal_doc.htm.

[10] *Id.*

[11] *Cumulative ADA Charge Data - Monetary Benefits from July 26, 1992 – September 30, 1999,* U.S. Equal Employment Opportunity Commission, published at http://www.eeoc.gov/stats/ada-monetary.html.

[12] *Id.*

legal and financial exposure, imposing broad costs on the individual employer and the economy in general.

B. Our Over-Taxed Judicial System Will Also Feel The Strain Of Increased Litigation.

Placing treatable ailments such as CTS under the ADA umbrella simply because it affects the ability to perform a narrow range of manual tasks will open the floodgates to a crippling surge of litigation. Private employment suits are already growing at an astronomical rate. In January of the year 2000, the Bureau of Justice Statistics published a study showing that from 1990 through 1998, private employment-related civil rights cases nearly tripled.[13]

These employment-related complaints accounted for approximately 65 percent of the overall increase in cases that have flooded the U.S. District Courts during this period.[14] This surge is due in large part to the ADA.[15] Providing legal redress under the ADA to many of the estimated 849,000 individuals who report CTS-like symptoms each year will substantially tax the resources of the court system.

The shear number of potential litigants compounded with the average delays in case processing will overwhelm the federal court dockets. The life span of an average employment case has increased considerably. According to the Federal Judicial Center, it takes almost two years (679.5 days) from the time an average case is filed in U.S. District

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[13] Marika F.X. Litras, *Civil Rights Complaints in U.S. District Court, 1990-98*, (NCJ-173427). Employment discrimination cases increased from 8,413 filings in 1990 to 23,735 in 1998.

[14] *Id.*

[15] 1998 JUDICIAL BUSINESS, United States Federal Judiciary, published at http://www.uscourts.gov/dirrpt98/judbus.pdf.

Court until the date of resolution.[16] Other surveys have found this to be a conservative estimate, finding instead that the average civil case lasts from two-and-one-half years[17] to eight years,[18] depending on the jurisdiction and the nature of the case.

Additionally, the EEOC's case resolution process works slowly. The EEOC itself has reported in recent years that it can take the agency nearly two years, on average, to process an employee's charge.[19] Thus, litigation is not a means of achieving swift justice. The end result is that all parties – the employee, employer, and court system – will suffer.

CONCLUSION

The National Association of Manufacturers respectfully urges this Court to grant the writ of certiorari to review the judgment below, to reverse the ruling that would permit plaintiffs to assert disability under the ADA based upon an impairment that only precludes the individual from performing a narrow subset of manual tasks associated with a specific job, and to affirm the principle that if an impairment only affects an individual's ability to work, that

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[16] Lewis Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 COLUM. HUMAN RIGHTS L. REV. 29, 56 (Fall 1998)

[17] B. Mahoney *et al.*, Implementing Delay Reduction and Delay Prevention Programs in Urban Trial Courts: Preliminary Findings, Vol. 8 (1985).

[18] *Evaluating and Using Employer-Initiated Arbitration Rules and Agreements in Employment Discrimination and Civil Rights Actions in Federal and State Courts* (ADLI-ABA Course of Study, Apr. 28-30) 875, 894 (1994).

[19] *Summary of Enforcement Data and Budget and Staffing Information for the EEOC: FY 1991 through FY 1997*, Office of Communications and Legislative Affairs, Equal Employment Opportunity Commission (Dec. 8, 1997).

asserted disability must be judged under the standards applicable to the major life activity of "working."

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IN THE

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TOYOTA MOTOR MANUFACTURING, KENTUCKY, INC.,

Petitioner,

v.

ELLA WILLIAMS,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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QUESTION PRESENTED

Whether the Sixth Circuit correctly held—in conflict with the established rule in other circuits—that an impairment precluding an individual from performing only a limited number of tasks associated with a specific job qualifies as a disability under the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq*.

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

Petitioner Toyota Motor Manufacturing, Kentucky, Inc. was defendant in the District Court and appellee before the Court of Appeals for the Sixth Circuit. Pursuant to S. Ct. Rule 29.6, petitioner notes that it is wholly owned by Toyota Motor Manufacturing North America, Inc., which is in turn wholly owned by Toyota Motor, North America, Inc., which is in turn wholly owned by Toyota Motor Corporation.

Respondent Ella Williams was plaintiff before the District Court and appellant before the Court of Appeals for the Sixth Circuit.

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Bragdon v. *Abbott*, 524 U.S. 624 (1998)	14, 15, 27
Broussard v. *University of Cal.*, 192 F.3d 1252 (9th Cir. 1999)	20
Chanda v. *Engelhard/ICC*, 234 F.3d 1219 (11th Cir. 2000)	13, 14
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Colwell v. *Suffolk County Police Dep't*, 158 F.3d 635 (2d Cir. 1998), *cert. denied*, 526 U.S. 1018 (1999)	19
Duncan v. *Washington Metro. Area Transit Auth.*, 240 F.3d 1110 (D.C. Cir.) (en banc), *petition for cert. filed*, No. 00-1776 (May 25, 2001)	20
Dutcher v. *Ingalls Shipbuilding*, 53 F.3d 723 (5th Cir. 1995)	12, 13, 20
Ford Motor Credit Co. v. *Milhollin*, 444 U.S. 555 (1980)	27
Forrisi v. *Bowen*, 794 F.2d 931 (4th Cir. 1986)	30
Francis v. *City of Meriden*, 129 F.3d 281 (2d Cir. 1997)	30
Garcia v. *United States*, 469 U.S. 70 (1984)	24

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Gordon v. *E.L. Hamm & Assocs., Inc.*, 100 F.3d 907 (11th Cir. 1996), *cert. denied*, 522 U.S. 1030 (1997)	12
Gutridge v. *Clure*, 153 F.3d 898 (8th Cir. 1998), *cert. denied*, 526 U.S. 1115 (1999)	20
Halperin v. *Abacus Tech. Corp.*, 128 F.3d 191 (4th Cir. 1997)	20
Henderson v. *Ardco, Inc.*, 247 F.3d 645 (6th Cir. 2001)	21
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Kelly v. *Drexel Univ.*, 94 F.3d 102 (3d Cir. 1996)	12
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Olson v. *General Elec. Astrospace*, 101 F.3d 947 (3d Cir. 1996)	19
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Roth v. *Lutheran Gen. Hosp.*, 57 F.3d 1446 (7th Cir. 1995)	17
Ryan v. *Grae & Rybicki, P.C.*, 135 F.3d 867 (2d Cir. 1998)	17
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Snow v. *Ridgeview Med. Ctr.*, 128 F.3d 1201 (8th Cir. 1997)	17
Standard v. *A.B.E.L. Servs., Inc.*, 161 F.3d 1318 (11th Cir. 1998)	20
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29 C.F.R. pt. 1630, App. § 1630.2	27
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29 C.F.R. § 1630.2(i)	2, 3, 11
29 C.F.R. pt. 1630, App. § 1630.2(j)	21
29 C.F.R. § 1630.2(j)(1)(i)	2, 28
29 C.F.R. § 1630.2(j)(1)(ii)	2, 3, 28
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S. Rep. No. 101-116 (1989)	24, 25
135 Cong. Rec. S10711 (daily ed. Sept. 7, 1989)	22
Other Authorities:	
3 Robert K. Ausman & Dean E. Snyder, *Ausman & Snyder's Medical Library* (1989)	4
Digest of Data on Persons with Disabilities (1984)	24
EEOC: Guidance on Workers' Compensation and ADA, 8 FEP Manual (BNA)	31
EEOC Technical Assistance Manual on the Employment Provisions (Title I) of the Americans With Disabilities Act, 8 FEP Manual (BNA)	31
Joan T. A. Gabel, *et al.*, *The New Relationship Between Injured Worker and Employer: An Opportunity for Restructuring the System*, 35 Am. Bus. L.J. 403 (1998)	31
National Council on Disability, *On the Threshold of Independence* (1988)	23
17 Oxford English Dictionary (2d ed. 1989)	13

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U.S. Dep't of Commerce, Bureau of the Census, *Statistical Abstract of the United States* (Table 184) (1989)	24
Webster's Third New International Dictionary (1976)	13
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BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the Sixth Circuit is reported at 224 F.3d 840 and reprinted in the appendix to the petition for certiorari ("Pet. App.") at 1a. That opinion amended and superseded a previous opinion, reprinted at Pet. App. 12a. The opinion of the District Court is not reported and is reprinted at Pet. App. 23a.

JURISDICTION

The initial judgment of the Sixth Circuit, entered on July 10, 2000, was withdrawn and an amended judgment entered on August 29, 2000. Pet. App. 1a. A timely petition for rehearing and rehearing en banc was denied on October 12,

2000. Pet. App. 57a. The petition for certiorari was filed on January 5, 2001, and granted on April 16, 2001. 121 S. Ct. 1600. The jurisdiction of the Sixth Circuit was based on 28 U.S.C. § 1291. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Section 3(2)(A) of the Americans with Disabilities Act of 1990 ("ADA"), Pub. L. No. 101-336, 104 Stat. 327, 329-330, 42 U.S.C. § 12102(2)(A), provides, in pertinent part: "The term 'disability' means, with respect to an individual * * * a physical or mental impairment that substantially limits one or more of the major life activities of such individual."

Section 1630.2(i) of Title 29, Code of Federal Regulations, provides: "Major Life Activities means functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."

Section 1630.2(j)(1)(i), (ii) of Title 29, Code of Federal Regulations, provides, in pertinent part: "The term substantially limits means: Unable to perform a major life activity * * * or [s]ignificantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity."

Other pertinent statutory and regulatory provisions are reprinted in the addendum hereto.

INTRODUCTION

The Americans with Disabilities Act is an antidiscrimination statute. By its terms it covers only those who have a "disability"—defined as an "impairment that substantially limits one or more of the major life activities." 42 U.S.C. § 12102(2)(A). The Sixth Circuit in this case found the

respondent, Ella Williams, disabled under the ADA because an impairment "substantially limit[ed] her ability to perform the range of manual tasks associated with an assembly line job"—one "requir[ing] the gripping of tools and arms to be kept overhead or at shoulder level repetitively for an extended period of time." Pet. App. 4a, 6a. Even though Williams could perform almost all other manual tasks at both work and home with no difficulty, including the manual tasks required by several other assembly-line positions, the court below found her substantially limited in the major life activity of performing manual tasks because she could not perform the narrow category of tasks associated with her specific job.

The Sixth Circuit's analysis conflicts with the statutory text, which requires that an impairment "substantially limit[]" a "major life activit[y]," 42 U.S.C. § 12102(2)(A), this Court's precedents, which have emphasized that the Act "concerns itself only with limitations that are in fact substantial" and that "significantly restrict" the ability to perform a major life activity, *Albertson's, Inc.* v. *Kirkingburg*, 527 U.S. 555, 563 (1999), and the regulatory guidance, which specifies that an individual is "disabled" only if she is "significantly restrict[ed]" in performing "basic activities" compared to the average person in the general population. 29 C.F.R. § 1630.2(i), (j)(1)(ii) & Appendix. The decision below also conflicts with the policy of the Act, by forcing employers to find an accommodation for individuals who may suffer from an impairment but are not disabled, thereby limiting available opportunities at work for the truly disabled individuals the Act was intended to protect.

Williams's difficulties performing a particular job requiring repetitive use of a tool with her arms above shoulder level for an extended period of time simply tell nothing about her general ability to carry out the major life activity of performing manual tasks. In finding a disability on the basis of that narrow showing, the decision below improperly

merged analysis under the major life activity of performing manual tasks with that of working, and circumvented the established rule that "[t]he inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working." *Id.* § 1630.2(j)(3)(i). It did so by finding a disability based solely on the inability to perform the *manual tasks* associated with a single, particular job. That decision should be reversed.

STATEMENT OF THE CASE

Located in Georgetown, Kentucky, petitioner Toyota Motor Manufacturing, Kentucky, Inc. ("TMMK") employs more than 7,500 individuals, many of whom work on assembly lines that produce Toyota automobiles sold in the United States and abroad. Williams joined TMMK in 1990, and soon began work on an assembly line that fabricated engines. Within months, however, she developed bilateral carpal tunnel syndrome ("CTS") in her wrists and bilateral tendinitis in her neck and arms, each affliction apparently the product of having had to grip vibrating pneumatic tools to perform her job.[1] Williams eventually consulted a physician, who "suggested that [she] avoid overhead work, constant repetitive use of the hands and arms for flexion or extension and vibratory tools." J.A. 37. He also limited her to lifting no more than twenty pounds and restricted frequent lifting or carrying to objects weighing up to ten pounds. *Id.* 45. Notwithstanding these limitations, Williams's physician believed that she could continue to work at TMMK. Pet. App. 25a.

[1] CTS "is caused by compression of the median nerve as it passes through the wrist between flexor tendons and the transverse carpal ligament. This area is called the carpal tunnel." 3 Robert K. Ausman & Dean E. Snyder, *Ausman & Snyder's Medical Library* § 4:18, at 53 (1989).

In an effort to accommodate Williams, TMMK assigned her to various "modified duty" jobs between 1991 and 1993. Despite those efforts, Williams spent months at a time during that period on medical leave, and eventually filed a claim under the Kentucky Workers' Compensation Act, which was settled in 1993. That same year, she filed another complaint against TMMK, this time in federal court under the ADA, claiming that she was denied a reasonable accommodation. That suit, too, was settled, clearing the way for Williams to return to work at TMMK in December 1993.

In its continuing effort to accommodate her, TMMK reassigned Williams to Quality Control Inspection Operations ("QCIO"), a unit of the assembly line known for having "the 'easiest jobs' at TMMK." Pet. App. 25a. There are four QCIO work stations, and Williams rotated each week between the two least physically taxing. In the first of these—known as Assembly Paint—she visually inspected one side of each painted car as it moved along a conveyor, searching for imperfections that might have occurred during the assembly or paint process. For a while, that job also required Williams to open and shut the doors, trunk, and hood of each passing car. Demanding slightly more physical exertion, the second QCIO position—Paint Inspection—required Williams to use both arms to wipe down each painted car as it progressed along the conveyor. Throughout her approximately three-year tenure with QCIO, "[i]t is undisputed that Williams was physically capable of performing these jobs and that her actual performance was satisfactory." *Id.* 26a.

Eventually, as part of a general initiative to increase factory productivity, TMMK determined that every QCIO employee should be capable of rotating among all four QCIO positions. One of the two that Williams had yet to work was another paint-inspection position called ED Surface Repair, also known as ED Inspection. This job required Williams, using a wooden-handled sponge, to apply a highlight oil to portions of one side of a car as it passed along the assembly line. The

oil highlighted potential flaws to facilitate visual inspection of the vehicle. Beyond the need to grip a tool, the job also differed from Williams's previous QCIO roles in that she had to work at regular intervals with her hands and arms at or above shoulder height. *Id.* 2a, 27a; Crane Dep. 60-61 (Oct. 2, 1997). Before Williams was rotated to this new position, TMMK's Industrial Health Services studied the ED Inspection job and determined that its physical demands would not exceed Williams's work restrictions. Mills Dep. 42-43, 53-59 (Oct. 2, 1997).

Although she completed without difficulty a week-long training regimen for this new position, Williams allegedly began to experience pain in her arms, hands, shoulders, and neck after several weeks at the new job. By her own account, Williams concluded that she was physically incapable of performing the duties that this new position demanded. She did not, however, consider herself unable to perform all assembly-line work. In fact, Williams herself suggested that TMMK return her to her previous two positions, both of which she "always maintained that she could perform without difficulty." Pet App. 27a. Due to her on-going problems, however, Williams eventually refused to show up for work. TMMK, in turn, deemed her to have voluntarily resigned and terminated her employment.

Williams subsequently brought suit under the ADA, claiming that TMMK had discriminated against her because of her disability by failing to offer her a reasonable accommodation. TMMK moved for summary judgment on the ground that Williams's ailments did not constitute a "disability" under the Act. *See* 42 U.S.C. § 12102(2)(A) (defining "disability" as an "impairment that substantially limits one or more of the major life activities of [an] individual"). Although Williams argued that her impairment affected such major life activities as performing manual tasks and work-

ing,[2] TMMK maintained that an inability to perform only a narrow subset of assembly-line duties—while remaining perfectly capable of executing a host of other manual tasks, including the very assembly-line work Williams had performed during the previous three years—did not constitute an "impairment that substantially limits one or more of the major life activities." 42 U.S.C. § 12102(2)(A).

The District Court granted TMMK's motion for summary judgment. With respect to the major life activity of performing manual tasks, the court agreed with TMMK that Williams's claim was "irretrievably contradicted by [her] continual insistence that she could perform the tasks in assembly and paint inspection without difficulty; positions requiring manual tasks." Pet. App. 36a. Turning to the major life activity of working, the court found dispositive the well-established principle that to be considered substantially limited in that major life activity, an ADA plaintiff "must show more than an inability to perform a single job or the job of her choice." *Id.* 37a (citing *Skorup* v. *Modern Door Corp.*, 153 F.3d 512, 515 (7th Cir. 1998); *Gilday* v. *Mecosta County*, 124 F.3d 760, 767 (6th Cir. 1997)).[3]

Williams appealed, and a divided panel of the Sixth Circuit reversed. Pet. App. 1a. In reaching its decision, the panel purported to resolve only the question whether "Williams is substantially limited in performing manual tasks." *Id.* 5a. It

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[2] Williams also suggested that her impairment limited the major life activities of "housework," "gardening," and "playing with her children." Pet. App. 34a-35a. The District Court rejected these claims, *id.* 35a-36a, and Williams did not press them on appeal.

[3] Williams also maintained that TMMK violated the ADA and the Family and Medical Leave Act, 29 U.S.C. § 2601 *et seq.*, by discontinuing her employment when she refused to return to work. On both claims, the Court of Appeals affirmed the District Court's grant of summary judgment in favor of TMMK. Pet. App. 6a-8a.

noted, however, that in *Sutton* v. *United Air Lines, Inc.*, 527 U.S. 471 (1999), this Court held that to be substantially limited in the major life activity of *working*, an "individual [must] be unable to perform a class or broad range of jobs." Pet. App. 3a-4a. The panel took from *Sutton* the notion that "[t]he analysis must be class based" with respect to the major life activity of performing manual tasks as well. *Id.* 4a. Narrowing the field even further, the panel found it sufficient with respect to that major life activity that the "manual disability involve[] a 'class' of manual activities *affecting* the ability to perform tasks *at work*." *Id.* (emphases added).

Applying its new test, the panel found Williams disabled because "her impairment substantially limit[ed] her ability to perform the range of manual tasks associated with an assembly line job." *Id.* According to the panel, it was irrelevant that Williams remained perfectly capable of accomplishing any number of manual tasks outside the narrow subset of assembly-line duties that gave her difficulty. *Id.* And even though Williams, by her own admission, remained capable of manually wiping down cars as she had done for the previous three years, the panel nonetheless considered her disabled because she could not perform the narrow category of "manual activities that * * * require the gripping of tools and arms to be kept overhead or at shoulder level repetitively for an extended period of time." *Id.* 6a.

Judge Boggs dissented. He observed that under "decisions of this and other courts, [Williams's] inability to perform certain types of tasks would not likely constitute being disabled with regard to the major life activity of working," because an "inability to perform a single, particular job does not constitute a substantial limitation on working." *Id.* 9a. Yet "the opinion today mistakenly takes what is here primarily a *subset* of abilities related to working, the ability to 'perform manual tasks,' and erroneously treats a partial limitation there as substantially limiting a major life activity." *Id.* 11a (emphasis in original).

Allowing a plaintiff to defeat summary judgment by merely " 'show[ing] that her manual disability involves a "class" of manual activities affecting the ability to perform tasks at work * * * conflates (and erodes) the standards for demonstrating a substantial limitation on 'working' and on 'performing manual tasks.' " *Id.* "These are separate inquiries," *id.*, and Williams failed both. She plainly did not demonstrate a substantial limitation on working because her impairment foreclosed her from performing only a "single, particular job." *Id.* Nor did she establish a substantial limitation with respect to manual tasks, for "her limitation is mostly confined to a subset of job-specific tasks." *Id.*; *see id.* 9a-10a ("as the [majority] opinion * * * correctly notes, Williams's difficulty is almost exclusively with the inability to do manual tasks that 'require the gripping of tools and repetitive work with hands and arms extended at or above shoulder levels for extended periods of time' "). Indeed, "the record evidence shows that Williams can perform many manual tasks, beginning, most obviously, with the wiping task [at TMMK] that she already had been doing prior to her newest assignment." *Id.* 9a.

Judge Boggs found it particularly telling that there were "no citations in the court's opinion, either to regulations or to cases, indicating that such a specific and partial limitation is considered a disability." *Id.* 10a. The reason: the vast majority of federal courts have concluded that such job-specific restrictions do *not* substantially limit the major life activities of performing manual tasks, taking care of oneself, or, of course, working. *Id.* Based on these cases, Judge Boggs concluded that "[m]easuring Williams's limitation against plaintiffs claiming similar limitations on other major life activities, she does not appear disabled." *Id.*

TMMK filed a timely petition for rehearing and rehearing en banc, which the Sixth Circuit denied. *Id.* 57a. This Court granted certiorari. 121 S. Ct. 1600.

SUMMARY OF ARGUMENT

I. The ADA establishes a rigorous threshold for coverage under the statute: the Act only applies to those individuals who can establish that a physical or mental impairment "*substantially* limits one or more of [their] *major* life activities." 42 U.S.C. § 12102(2)(A) (emphases added). The court below undermined this "fundamental statutory requirement," *Albertson's, Inc.* v. *Kirkingburg*, 527 U.S. at 565, in finding respondent Williams disabled solely because of her inability to perform the particular manual tasks associated with her job—"gripping of tools and repetitive work with hands and arms extended at or above shoulder levels for extended periods of time." Pet. App. 4a. Williams's difficulties in performing those particular job-related assignments tell nothing about whether she is substantially limited in the basic life function of performing manual tasks. The Sixth Circuit not only failed to give effect to the terms of the statute, but also conflated the major life activities of performing manual tasks and working. By finding a disability based solely on an inability to "perform the manual tasks that are *job-related*," *id.* 5a (emphasis added), the court below circumvented the established rule that a disability must amount to more than an inability to do a specific job.

II. The findings in the ADA itself confirm that the statute extends only to those who are truly disabled—not those whose difficulties are essentially confined to the demands of a particular job. Congress explained that it enacted the ADA in response to the "serious and pervasive social problem" of discrimination against a "discrete and insular minority," 42 U.S.C. § 12101(a)(2), (7)—hardly an apt description of those who experience difficulty with tasks that "require the gripping of tools and repetitive work with hands and arms extended at or above shoulder levels for extended periods of time." Pet. App. 4a. Our society does not have a history of discriminating against such people. The Committee Reports on the ADA make clear that Congress was instead concerned

with those who suffer from more fundamental restrictions on basic daily functions, a view confirmed by the guidance provided by executive agencies implementing the Act. Dramatically broadening the reach of the ADA—as the decision below would do—would actually harm those it was intended to protect, by forcing the truly disabled to compete with those who are merely impaired in some limited way for reasonable workplace accommodations.

ARGUMENT

Among the three definitions of "disability" set forth in the ADA, the one at issue in this case provides that "[t]he term 'disability' means, with respect to an individual * * * a physical or mental impairment that substantially limits one or more of the major life activities of such individual." 42 U.S.C. § 12102(2)(A).[4] Here, there is no dispute that Williams's CTS constitutes a physical impairment within the meaning of the Act, *see* 29 C.F.R. § 1630.2(h)(1) (defining "physical impairment" as "[a]ny physiological disorder, or condition * * * affecting one or more of the following body systems: * * * musculoskeletal"), or that "performing manual tasks" is a major life activity, *see id.* § 1630.2(i) (listing "performing manual tasks" as one example of a major life activity). The question is whether Williams's inability to perform the particular manual tasks associated with her specific job, without more, demonstrates that she is "sub-

[4] The other two prongs of the ADA's disability definition state that an individual is disabled if she has "a record of such [a substantially limiting] impairment," 42 U.S.C. § 12102(2)(B), or is "regarded as having such an impairment," *id.* § 12102(2)(C). Williams claimed that she was disabled under both of these alternative formulations, but the District Court disagreed and entered judgment in Toyota's favor on those grounds as well. Pet. App. 43a-47a. Because the Sixth Circuit found Williams to be disabled under 42 U.S.C. § 12102(2)(A), it declined to address whether she would have prevailed under either of the other two provisions. Pet. App. 6a.

stantially limit[ed]" in the major life activity of performing manual tasks. As we explain below, the Sixth Circuit erred in so holding.

I. THE ADA RESTRICTS COVERAGE TO THOSE SUBSTANTIALLY LIMITED IN A MAJOR LIFE ACTIVITY, AND THE SIXTH CIRCUIT ERRED IN CONSIDERING ONLY A NARROW SUBSET OF THE MAJOR LIFE ACTIVITY OF PERFORMING MANUAL TASKS.

A. The ADA Extends To Impairments That Substantially Limit A Major Life Activity, Not Merely A Discrete Subset Of Such An Activity.

As with any statute, the starting point for determining the scope of the ADA is the language of the statute itself. *Williams* v. *Taylor*, 529 U.S. 420, 431 (2000); *Bailey* v. *United States*, 516 U.S. 137, 144-145 (1995). To be "disabled" and therefore come within the ambit of the ADA, an individual must have a "physical or mental impairment that substantially limits one or more of [her] major life activities." 42 U.S.C. § 12102(2)(A). On its face, the Act clearly contemplates that a disabling impairment must be one that imposes severe restrictions on an important, basic function in life. Not every impairment therefore is a disability, since not every impairment significantly constrains an individual's important life activities. *See Dutcher* v. *Ingalls Shipbuilding*, 53 F.3d 723, 726 (5th Cir. 1995) ("[a] physical impairment, standing alone, is not necessarily a disability as contemplated by the ADA"); *accord Gordon* v. *E.L. Hamm & Assocs., Inc.*, 100 F.3d 907, 911 (11th Cir. 1996), *cert. denied*, 522 U.S. 1030 (1997); *Kelly* v. *Drexel Univ.*, 94 F.3d 102, 108 (3d Cir. 1996).

Where, as here, the major life activity in question is the ability to perform manual tasks, individuals claiming coverage under the ADA must demonstrate that they are severely restricted from using their hands to perform a broad range of basic functions needed to meet the essential demands of

everyday life. That is because the Act "concerns itself only with limitations that are in fact substantial." *Albertson's, Inc.* v. *Kirkingburg*, 527 U.S. at 565. As this Court has held, although "[t]he ADA does not define 'substantially limits,' * * * 'substantially' suggests 'considerable' or 'specified to a large degree.' " *Sutton* v. *United Air Lines, Inc.*, 527 U.S. 471, 491 (1999) (quoting Webster's Third New International Dictionary 2280 (1976)). Put another way, "substantial" means " 'relating to or proceeding from the essence of a thing.' " *Id.* (quoting 17 Oxford English Dictionary 66-67 (2d ed. 1989)) (internal brackets omitted); *see* Webster's Third New International Dictionary 2280 (1993) ("of or relating to the main part of something").

Being able to use one's hands to meet the basic demands of life is the essence of the major life activity of performing manual tasks. For an impairment to "substantially limit" the ability to perform manual tasks, then, the impairment must impose a *considerable* restriction on the essential elements of that activity. It should thus come as no surprise that the lower federal courts—with the exception of the Sixth Circuit—have evaluated claims of manual disability by examining the extent to which an individual's impairment constrains his ability to "perform daily activities, including dressing himself [and] driving," *Chanda* v. *Engelhard/ICC*, 234 F.3d 1219, 1223 (11th Cir. 2000), as well as such fundamental tasks as the ability to "bathe, dress, write with a pencil and pen, work around the house, cook, and work." *Hilburn* v. *Murata Elecs. N. Am.*, 181 F.3d 1220, 1228 (11th Cir. 1999); *see Dutcher*, 53 F.3d at 726 (finding plaintiff not substantially limited where she could "feed herself, drive a car, attend her grooming, carry groceries, wash dishes, vacuum, and pick up trash with her impaired hand" and essentially "do all of the basic things she needs to do in life with her arm"). The point is that to be "substantially limited"—or limited to a "large degree"—in the major life activity of performing manual tasks, an individual "must

demonstrate that he is substantially limited in a range of manual tasks rather than a narrow category thereof," *Chanda* v. *Engelhard/ICC*, 234 F.3d at 1223, and the sorts of tasks the individual cannot accomplish must go to the heart of what makes the ability to perform manual tasks a major life activity.

The Sixth Circuit, however, found Williams substantially limited in performing manual tasks because she could not perform the narrow class of tasks that "require the gripping of tools and repetitive work with hands and arms extended at or above shoulder levels for extended periods of time." Pet. App. 4a. That idiosyncratic limitation says nothing about Williams's more general ability to conduct the important functions that make up the major life activity of performing manual tasks.

Indeed, as this Court has held, "the plain meaning of the word 'major' denotes comparative importance and suggests that the touchstone for determining an activity's inclusion under the statutory rubric is its significance." *Bragdon* v. *Abbott*, 524 U.S. 624, 638 (1998) (internal quotation and brackets omitted). The reason "performing manual tasks" is a major life activity is that the ability to use one's hands to accomplish basic functions is an undeniably important and significant aspect of life. Not so for the narrow subset of manual tasks "requir[ing] the gripping of tools and repetitive work with hands and arms extended at or above shoulder levels for extended periods of time." Pet. App. 4a. Simply because someone is limited—even substantially limited—from performing such a category of tasks does not mean that the person is substantially limited in a way that is significant and comparatively important to the conduct of life. In fact, it is impossible to measure whether a major life activity has been impaired to a "large degree" if the manual disability analysis begins and ends with some idiosyncratic manual function that an individual has difficulty executing.

Certainly the inability to engage in a repetitive task for extended periods of time with one's hands above shoulder level pales in "comparative importance" and "significance" when juxtaposed with the sort of functions Congress considered to be major life activities when it enacted the ADA. Although it did not expressly define the term "major life activity" in the Act itself, Congress was not writing on a blank slate. As this Court observed in *Bragdon*, "[t]he ADA's definition of 'disability' is drawn almost verbatim from the definition of 'handicapped individual' included in the Rehabilitation Act of 1973." 524 U.S. at 631. Accordingly, "the ADA must be construed to be consistent with the regulations issued to implement the Rehabilitation Act." *Id.* at 638. Those regulations specifically list as examples of major life activities such basic, fundamental functions as breathing, seeing, hearing, and walking. *See* 45 C.F.R. § 84.3(j)(2)(ii); 28 C.F.R. § 41.31(b)(2). In terms of importance, there is a profound difference between a substantial limitation on the ability to see or to hear and a substantial limitation on the particularized ability to engage in repetitive work with one's arms above shoulder level for an extended period of time while gripping a wooden tool.

Instead of considering whether Williams's impairment substantially limited her general ability to perform manual tasks compared to the average person in the general population, the Sixth Circuit posed a different question: did Williams "show that her manual disability involves a 'class' of manual activities affecting the ability to perform tasks at work"? Pet. App. 4a. The Sixth Circuit mistakenly assumed that such a class-based framework was mandated by "the language of the Act, the EEOC's interpretation and the Supreme Court's analysis in *Sutton*." *Id.* Not so. In *Sutton*, the question was whether the plaintiff had demonstrated a substantial limitation on the major life activity of *working*. 527 U.S. at 491. Looking to the EEOC regulations, this Court observed that the agency "uses a *specialized definition*

of the term 'substantially limits' when referring to the major life activity of working," whereby an individual must be " 'significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person.' " *Id.* (quoting 29 C.F.R. § 1630.2(j)(3)(i)) (emphasis added). There is no basis for applying to the major life activity of performing manual tasks a class-based framework that, by its own terms, is unique to the "specialized definition" of disability reserved for "working" claims. And, as applied by the Sixth Circuit, this class-based analysis led it into error, because that analysis allowed the court to find a disability based on Williams's difficulties with a *subset* of manual tasks, without ever even considering whether those difficulties constituted a substantial limitation on the overall major life activity of performing manual tasks.

The court below also compounded its analytic error by selecting an exceedingly narrow "class" by which to measure Williams's limitations: the class of "manual tasks associated with an assembly line job." Pet. App. 4a. That Williams experienced difficulty in a job requiring her to work repetitively for several hours at a time with her hands above her shoulders while gripping a wooden tool says nothing about her ability to perform manual tasks generally. It certainly does not alter the fact that, when it comes to the *basic* tasks of daily life, Williams can function just about as well as anyone else. The Sixth Circuit, however, turned the logic of the ADA on its head, finding that just because "Williams *can* perform a range of isolated, non-repetitive manual tasks performed over a short period of time, such as tending to her personal hygiene or carrying out personal or household chores, [that] does not [a]ffect a determination that her impairment substantially limits her ability to perform the range of manual tasks *associated with an assembly line job*." Pet. App. 4a (emphases added). But to say that an individual is "disabled" because she cannot use her hands in one isolated employment context even though she remains largely

unfettered in her ability to accomplish the basic manual functions demanded by daily life—grasping and picking up items, for example—is to "undercut the fundamental statutory requirement that only impairments causing 'substantial limitations' in individuals' ability to perform major life activities constitute disabilities." *Albertson's, Inc.* v. *Kirkingburg*, 527 U.S. at 565.

To be sure, the Sixth Circuit suggested that such specific limitations can "*affect* manual tasks associated with working, as well as manual tasks associated with recreation, household chores and living generally." Pet. App. 6a (emphasis added). Williams herself has made the same point before this Court. *See* Opp. Cert. 6 ("Ms. Williams' impairment affects activities of daily living and curtails activities."); *id.* 10 (Williams's "limitations affect activities of daily living"). But the fact that such a particular restriction might *affect* other areas of Williams's life is not to say, as the terms of the ADA require, that Williams is in fact *substantially limited* in accomplishing any of those activities. *See Ryan* v. *Grae & Rybicki, P.C.*, 135 F.3d 867, 870-871 (2d Cir. 1998) ("in assessing whether a plaintiff has a disability, courts have been careful to distinguish impairments which merely *affect* major life activities from those that *substantially limit* those activities") (emphasis in original); *Snow* v. *Ridgeview Med. Ctr.*, 128 F.3d 1201, 1207 (8th Cir. 1997) ("It is not enough that an impairment affect a major life activity."); *Roth* v. *Lutheran Gen. Hosp.*, 57 F.3d 1446, 1454 (7th Cir. 1995) ("not every impairment that affect[s] an individual's major life activities is a substantially limiting impairment").[5]

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[5] Indeed, as noted earlier, the Sixth Circuit recognized that Williams could "perform a range of isolated non-repetitive manual tasks performed over a short period of time, such as tending to her personal hygiene or carrying out personal or household chores." Pet. App. 4a. The Court of Appeals so found notwithstanding the fact that Williams "occasionally" needs help raising her arms to get dressed, J.A. 32, sometimes experiences discomfort after

Nor is there anything to the Sixth Circuit's contention that Williams's "ailments are analogous to having *missing, damaged or deformed* limbs that prevent her from doing the tasks associated with certain types of manual assembly line jobs * * * that require the gripping of tools and repetitive work with hands and arms extended at or above shoulder levels for extended periods of time." Pet. App. 4a (emphasis added). Regardless of whether Williams is no more capable than someone with deformed limbs of performing the exceptionally narrow class of assembly line jobs she was unable to do, the fact remains that, unlike the person with deformed or missing limbs, Williams is very much capable of using her hands to accomplish the basic, fundamental tasks that the average person normally performs with little difficulty. She can brush her teeth, she can do the laundry, she can pick up items from the floor, and she can drive a car—all with minimal, if any, discomfort. J.A. 13-15, 32-36. What is more, she has always insisted that she can perform several other assembly-line jobs at TMMK. Pet. App. 36a; J.A. 15, 24, 41. That is simply not the case for the person who has missing or deformed limbs. It is her ability to perform the *basic* tasks that the average person does in the course of a day that separates Williams from the truly disabled.[6]

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driving long distances, *id.* 35-36, and has been placed under a 20-pound lifting restriction by her treating physician, *id.* 45.

[6] By using the Sixth Circuit's language, we do not mean to suggest that an individual must be afflicted with "missing, damaged or deformed limbs" to be substantially limited in the major life activity of performing manual tasks. Nor do we contend that CTS, as a matter of law, can never constitute a disability under the ADA. It is not difficult to imagine a case of CTS so severe that it precludes an individual from performing a broad range of basic manual functions that the average person typically performs without difficulty. Where the Sixth Circuit erred was in finding that an individual with CTS—or any impairment for that matter—is disabled under the Act so long as she can demonstrate that her

B. The Sixth Circuit Decision Circumvents The Rule That An Inability To Perform A Single Job Is Not A Substantial Limitation On The Major Life Activity Of Working.

The Sixth Circuit's approach effectively makes an end-run around the restrictions both this Court and the EEOC have recognized for establishing a disability based on the major life activity of working. This Court has held that "[w]hen the major life activity under consideration is that of working, the statutory phrase 'substantially limits' requires, at a minimum, that plaintiffs allege they are unable to work *in a broad class of jobs*." *Sutton*, 527 U.S. at 491 (emphasis added). It therefore follows that

> To be substantially limited in the major life activity of working * * * *one must be precluded from more than one type of job, a specialized job, or a particular job of choice.* If jobs utilizing an individual's skills (but perhaps not his or her unique talents) are available, one is not precluded from a substantial class of jobs. Similarly, if a host of different types of jobs are available, one is not precluded from a broad range of jobs. [*Id.* at 492 (emphasis added).]

This accords with the approach adopted not only by the EEOC, *see* 29 C.F.R. § 1630.2(j)(3)(i) ("The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working."), but also by every federal court of appeals.[7]

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impairment limits her ability to perform the manual tasks associated with her job, regardless of whether she can perform a host of other manual tasks.

[7] *See Santiago Clemente* v. *Executive Airlines, Inc.*, 213 F.3d 25, 32 (1st Cir. 2000); *Colwell* v. *Suffolk County Police Dep't*, 158 F.3d 635, 643 (2d Cir. 1998), *cert. denied*, 526 U.S. 1018 (1999); *Olson* v. *General Elec. Astrospace*, 101 F.3d 947, 952 (3d Cir.

The Sixth Circuit's decision, however, eviscerates these well-established doctrinal and regulatory principles, and in the process legitimates an entire species of disability claims that had heretofore been universally rejected: those based on an inability to perform a single job. That is because the panel's approach improperly collapses the important distinction between the major life activity of working and that of performing manual tasks. Under the Sixth Circuit's rule, an ADA plaintiff is deemed "substantially limited" in the major life activity of *performing manual tasks* if she can demonstrate simply that her impairment "seriously reduces her ability to perform the manual tasks that are *job-related*." Pet. App. 5a (emphasis added); *see id.* 2a ("key issue" focuses on "plaintiff's physical difficulties in using her hands, arms and shoulders, *as required by her new job*") (emphasis added); *id.* 4a ("in order to be disabled the plaintiff must show that her manual disability involves a 'class' of manual activities affecting the ability to perform tasks at work").

With this new hybrid rule, thousands of individuals whose impairments only preclude them from working one particular job or one type of job can now evade the limits on the major life activity of working that this Court established in *Sutton* by simply recasting their impairment as one substantially limiting the major life activity of performing manual tasks.

1996); *Halperin* v. *Abacus Tech. Corp.*, 128 F.3d 191, 199 (4th Cir. 1997); *Dutcher* v. *Ingalls Shipbuilding*, 53 F.3d at 727; *McKay* v. *Toyota Motor Mfg., U.S.A., Inc.*, 110 F.3d 369, 373 (6th Cir. 1997); *Skorup* v. *Modern Door Corp.*, 153 F.3d at 515; *Gutridge* v. *Clure*, 153 F.3d 898, 901 (8th Cir. 1998), *cert. denied*, 526 U.S. 1115 (1999); *Broussard* v. *University of Cal.*, 192 F.3d 1252, 1256-57 (9th Cir. 1999); *Bolton* v. *Scrivner, Inc.*, 36 F.3d 939, 942-943 (10th Cir. 1994), *cert. denied*, 513 U.S. 1152 (1995); *Standard* v. *A.B.E.L. Servs., Inc.*, 161 F.3d 1318, 1327 (11th Cir. 1998); *Duncan* v. *Washington Metro. Area Transit Auth.*, 240 F.3d 1110, 1114 (D.C. Cir.) (en banc), *petition for cert. filed*, No. 00-1776 (May 25, 2001).

By doing so, it would no longer be fatal to their disability claims that they were precluded from only one particular job. Indeed, under the Sixth Circuit approach, all that is necessary to establish a disability is a showing that they are substantially limited in a *subset* of the requirements of a particular job—the manual tasks associated with that particular job. *See id.* 11a (Boggs, J., dissenting).

As this Court has noted, "there may be some conceptual difficulty in defining 'major life activities' to include work," since the exclusion from work would supply both the qualifying disability as well as the actionable discriminatory conduct. *Sutton*, 527 U.S. at 492. Accordingly, "even the EEOC has expressed reluctance to define 'major life activities' to include working and has suggested that working be viewed as a residual life activity, considered, as a last resort, *only* '[i]f an individual is not substantially limited with respect to *any other* major life activity.' " *Id.* (quoting 29 C.F.R. pt. 1630, App. § 1630.2(j)) (emphases added by Court). Although the court below purported to consider only the major life activity of performing manual tasks, not that of working, Pet. App. 5a, its manual tasks analysis raised all the same difficulties that have concerned this Court and the EEOC in the working context, because that analysis focused solely on the "ability to perform the manual tasks that are job-related." *Id.* [8]

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[8] The Sixth Circuit has adhered to this approach in subsequent cases. *See, e.g., Henderson* v. *Ardco, Inc.*, 247 F.3d 645, 652 (6th Cir. 2001) (applying holding in *Williams* even though ruling in that case "appears to combine assessment of * * * impairment in manual tasks and * * * impairment in working, and inquiries into the existence of the requisite level of impairment should, as a general matter, be conducted in a separate and distinct fashion for each major life activity"); *Kiphart* v. *Saturn Corp.*, 251 F.3d 573 (6th Cir. 2001) (jury could find disability based on substantial limitation with respect to "an entire class of manual activities associated with assembly-line and product-handling jobs involving

II. OTHER EVIDENCE OF LEGISLATIVE INTENT CONFIRMS THAT AN IMPAIRMENT MUST SIGNIFICANTLY RESTRICT A BASIC LIFE FUNCTION TO QUALIFY AS A DISABILITY.

A. Congress's Findings Confirm That Disability Status Under The ADA Depends On The Extent To Which An Individual Is Constrained From Performing The Basic Functions In Life.

Congress enacted the ADA to rectify a "serious and pervasive social problem": the historic "isolat[ion] and segregat[ion]" of individuals with disabilities. 42 U.S.C. § 12101(a)(2). In its statutory findings, Congress stated that

> individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypical assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society. [*Id.* § 12101(a)(7).]

Congress's invocation of the phrase "discrete and insular minority" is a "telling indication of its intent to restrict the ADA's coverage to a confined, and historically disadvantaged, class." *Sutton*, 527 U.S. at 494-495 (Ginsburg, J., concurring). *See also* 135 Cong. Rec. S10711 (daily ed. Sept. 7, 1989) ("For too long, individuals with disabilities have been excluded, segregated, and otherwise denied equal, effective, and meaningful opportunity to participate in the

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the use of vibrating, hand-held power tools and requiring frequent, repetitive twisting, bending, or flexing of the wrists, elbows, or neck").

economic and social mainstream of American life.") (Sen. Harkin).

Not to put too fine a point on it, individuals who are substantially limited in their ability to engage in repetitive work for extended periods of time with their arms raised above their shoulders while gripping a wooden tool—but who are otherwise perfectly capable of using their hands to perform basic manual tasks—have not been "historically * * * isolate[d] and segregate[d]"; they have not been relegated to "an inferior status in our society." 42 U.S.C. § 12101(a)(2), (6). Unlike individuals who struggle simply to use their hands to accomplish the basic demands of everyday life, those who are merely impaired in accomplishing discrete tasks "can be found in every social and economic class; they do not cluster among the politically powerless, nor do they coalesce as historical victims of discrimination." *Sutton*, 527 U.S. at 494 (Ginsburg, J., concurring). In the end, it is impossible to confer the status of "disabled" on such a class of persons without doing violence to the terms of the ADA and the congressional finding that the Act was intended to reach those who actually constitute a "discrete and insular minority."

Congress also found that "some 43,000,000 Americans have one or more physical or mental disabilities." 42 U.S.C. § 12101(a). The report that served as the "likely source" for this figure, *Sutton*, 527 U.S. 485-486, and other contemporaneous studies that reached a similar calculation, defined the disabled as persons who have "difficulty performing one or more *basic* physical activities" such as "seeing, speaking, walking, using stairs, lifting or carrying, getting around outside, getting around inside, and getting out of bed." National Council on Disability, *On the Threshold of Independence* 7 (1988) (emphasis added); *see Sutton*, 527 U.S. at 486-487 (pertinent studies defined disabled as "individuals with 'activity limitations' * * * who, relative to their age-sex group could not conduct '*usual*' activities: *e.g.*, attending

preschool, keeping house, or living independently") (citing *Digest of Data on Persons with Disabilities* 25 (1984); U.S. Dep't of Commerce, Bureau of the Census, *Statistical Abstract of the United States* 115 (Table 184) (1989)).

These various reports confirm that, when it enacted the ADA, Congress was clearly contemplating persons who were significantly impaired from performing the "basic" or "usual" activities in life. Whether someone is substantially limited in performing manual tasks therefore must depend on the extent to which that person is unable to use her hands to accomplish basic functions. Congress simply did not envision the ADA encompassing individuals who, though unable to use their hands to perform a particular job, were otherwise capable of day-to-day manual tasks.

B. The Legislative History Of The ADA Supports Limiting Coverage To Those Significantly Restricted In Important Life Functions.

The legislative history of the ADA confirms what the language of the statute makes clear: that coverage under the Act extends only to those who suffer severe restrictions in their ability to perform important, basic activities. To begin with, reports from both the House and Senate[9] emphasize that "[a] physical or mental impairment does not constitute a disability * * * for purposes of the ADA unless its severity is such that it results in a 'substantial limitation of one or more major life activities.' " H.R. Rep. No. 101-485, Pt. II, at 52 (1990); *accord* S. Rep. No. 101-116, at 22 (1989). These declarations clearly evince Congress's intent *not* to include all

[9] *See Garcia* v. *United States*, 469 U.S. 70, 76 (1984) ("In surveying legislative history we have repeatedly stated that the authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill, which 'represen[t] the considered and collective understanding of those Congressmen involved in drafting and studying the proposed legislation.") (quoting *Zuber* v. *Allen*, 396 U.S. 168, 186 (1969)).

physically impaired individuals under the ADA's disability rubric. Lest there be any doubt, the Committees went on to note that "[a] person with a minor, trivial impairment * * * is not impaired in a major life activity." H.R. Rep. No. 101-485, Pt. II, at 52; *accord* S. Rep. No. 101-116, at 23.

Elsewhere in the Reports, the Committees explained that to suffer a "substantial limitation" in a "major life activity" means to be severely impaired in the ability to do basic functions that are performed with little or no difficulty by the average person in the general population. *See* H.R. Rep. No. 101-485, Pt. II, at 52; S. Rep. No. 101-116, at 23. That Congress was concerned with impairments that severely restrict the essence of an important life function is clear from the examples the House Committee provided: "a person who is a paraplegic will have a substantial difficulty in the major life activity of walking; a deaf person will have a substantial difficulty in hearing aural communications; and a person with lung disease will have a substantial limitation in the major life activity of breathing." H.R. Rep. No. 101-485, Pt. II, at 52.

The Committees explained that "[a] person is considered an individual with a disability * * * when the individual's *important* life activities are restricted as to the conditions, manner, or duration under which they can be performed in comparison to most people." H.R. Rep. No. 101-485, Pt. II, at 52 (emphasis added); *accord* S. Rep. No. 101-116, at 23. In this case, Williams, when compared to most people, is not significantly restricted as to the conditions, manner, or duration under which she can perform basic manual tasks. Indeed, not only can she "tend[] to her personal hygiene" and "carry[] out personal or household chores," Pet. App. 4a, but she can even do other assembly-line jobs that require her to rub both hands in a back-and-forth motion against the exterior of an automobile. *See* J.A. 15, 24, 41; Pet. App. 9a ("the record evidence shows that Williams can perform many manual tasks, beginning, most obviously, with the wiping

task that she already had been doing prior to her newest assignment") (Boggs, J., dissenting). Her impairment prevents her only from "doing the tasks associated with certain types of manual assembly line jobs * * * that require the gripping of tools and repetitive work with hands and arms extended at or above shoulder levels for extended periods of time." Pet. App. 4a.

The Committees made it abundantly clear, however, that the fact that someone is unable to do a subset or a "class" of a major life activity not widely performed by the average person does not, without more, establish a disability under the ADA. By way of a hypothetical, the Committees explained: "A person who can walk for 10 miles continuously is not substantially limited in walking merely because on the eleventh mile, he or she begins to experience pain because most people would not be able to walk eleven miles without experiencing some discomfort." H.R. Rep. No. 101-485, Pt. II, at 52; *accord* S. Rep. No. 101-116, at 23. Nothing in the legislative history—much less the text of the ADA itself—suggests that Congress's hypothetical walker would suddenly be deemed substantially limited in the major life activity of walking if the ability to walk 11 continuous miles turned out to be related to a particular job he held, say, as a park ranger or an outdoor guide. The reason is obvious: The inability to walk 11 miles—job-related though it may be—indicates nothing about someone's ability to do the basic aspects of walking that are important to the average person on a day-to-day basis. The Sixth Circuit's contrary understanding of the ADA should be rejected.

C. Executive Agencies Have Consistently Construed The ADA To Extend Only To Significant Restrictions On Fundamental Life Activities.

All three Executive agencies charged with implementing the ADA have consistently interpreted the Act's disability

provision to require more than a mere inability to perform a category of activities defined by their relation to a particular job. *See* 28 C.F.R. pt. 35, App. A, § 35.104 (Department of Justice); 29 C.F.R. pt. 1630, App. § 1630.2 (EEOC); 49 C.F.R. § 37.3 (Department of Transportation). This Court generally respects such administrative pronouncements where, as here, the agencies "played a pivotal role in setting the statutory machinery in motion." *Ford Motor Credit Co.* v. *Milhollin*, 444 U.S. 555, 566 (1980) (internal quotation and brackets omitted). At the very least, such views "constitute a body of experience and informed judgment to which [this Court] may properly resort" for additional guidance. *Skidmore* v. *Swift Co.*, 323 U.S. 134, 140 (1944).[10]

Consistent with the text of the ADA, the Interpretive Guidance issued by the EEOC provides that major life activities "are those *basic* activities that the average person in the general population can perform with little or no difficulty." 29 C.F.R. pt. 1630, App. § 1630.2(i) (emphasis added). Here again, it is clear that the focus is on those who cannot do the sort of essential functions that most people perform in their lives. Holding one's hands and arms above the shoulders for hours on end while gripping a block of wood is not a basic activity of life.

The EEOC's Interpretive Guidance emphasizes that even when an impairment affects a major life activity, it frequently may not rise to the level of a disability: "*Many* impairments do not impact an individual's life to the degree that they constitute disabling impairments." *Id.* (emphasis added).

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[10] Although this Court has held that agency regulations implementing and enforcing Titles I, II, and III are entitled to deference under *Chevron U.S.A. Inc.* v. *NRDC, Inc.*, 467 U.S. 837, 844 (1984), *see Bragdon*, 524 U.S. at 646-647, it has noted that Congress did not specifically delegate to any agency the power to interpret "disability," and has reserved the question what level of deference such agency views deserve, *see Sutton*, 527 U.S. at 480.

Rather, as the ADA itself makes clear, the impairment must "substantially limit" a major life activity. That, in turn, means more than simply being unable to do a particular job. It means being "[u]nable to perform a major life activity that the average person in the general population can perform," 29 C.F.R. § 1630.2(j)(1)(i), or being "*[s]ignificantly restricted* as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity." *Id.* § 1630.2(j)(1)(ii) (emphasis added). As this Court has held, the EEOC's "codified regulations interpreting the term 'substantially limits' " are entirely consistent with the natural meaning of those words as requiring limitations of a "considerable" or "large degree." *Sutton*, 527 U.S. at 491.

Were this not enough, the EEOC's regulations go on to prescribe a rubric by which to measure whether an individual is, in fact, substantially limited in a major life activity that further demonstrates that an inability to do the tasks associated with a particular job is not, without more, a disability under the Act. Among the factors that the agency has deemed relevant to the inquiry are: "(i) [t]he nature and severity of the impairment; (ii) [t]he duration or expected duration of the impairment; and (iii) [t]he permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment." 29 C.F.R. § 1630.2(j)(2)(i)-(iii). If the only way in which an impairment limits an individual is to preclude that person from performing the functions required by a specific job, the "nature and severity" of that impairment can hardly be described as significantly restricting "[a] basic activit[y] that the average person in the general population can perform with little or no difficulty." 29 C.F.R. pt. 1630, App. § 1630.2(i).

D. The Policy Underlying The ADA Is Disserved By An Interpretation Broadening Its Reach Beyond The Truly Disabled.

1. The ADA "is not a general protection of medically afflicted persons." *Christian* v. *St. Anthony Med. Ctr., Inc.*, 117 F.3d 1051, 1053 (7th Cir. 1997), *cert. denied*, 523 U.S. 1022 (1998). It is a statute designed to alleviate discrimination against a discrete and insular minority of disabled individuals. The Sixth Circuit's decision, however, extended the Act's protections well outside its ambit. By according "disabled" status to those whose impairments restrict them only from performing a small subset of manual tasks, the Sixth Circuit created a broad class of claimants whose demands will inevitably conflict with those of the disabled individuals Congress intended to protect.

As explained above, Congress intended to "restrict the ADA's coverage to a confined, and historically disadvantaged, class." *Sutton*, 527 U.S. at 495 (Ginsburg, J., concurring). To cabin the reach of the statute in accordance with its aims, Congress imposed a "fundamental statutory requirement," *Albertson's, Inc.* v. *Kirkingburg*, 527 U.S. at 565: the ADA would be triggered only when an impairment imposed "substantial[] limits" on major life activities. 42 U.S.C. §12102(2)(A). The legislature repeatedly stated that an impairment that did not significantly impact one of life's important activities "does *not* constitute a disability" for purposes of the ADA. *See, e.g.*, H.R. Rep. No. 101-485, Pt. II, at 52 (emphasis added).

The Sixth Circuit read the Act to require much less. Its decision opens the ADA to enforcement not just by a "discrete and insular minority" of historically disadvantaged disabled people, 42 U.S.C. § 12101(a)(7), but a vast assembly of workers suffering from various lesser afflictions. Congress set markedly different bounds than those. As prior courts have recognized, " '[i]t would debase [the ADA's]

high purpose if the statutory protections available to those truly handicapped could be claimed by anyone whose disability was minor and whose relative severity of impairment was widely shared.' " *Francis* v. *City of Meriden*, 129 F.3d 281, 286 (2d Cir. 1997) (quoting *Forrisi* v. *Bowen*, 794 F.2d 931, 934 (4th Cir. 1986) (construing Rehabilitation Act)); *cf. Rodriguez* v. *United States*, 480 U.S. 522, 526 (1987) (noting that it "frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law") (emphasis in original).

Indeed, broadening the Act to protect the vast number of individuals who are *somewhat* impaired in performing *some* isolated manual tasks would harm the truly disabled. An employer's obligation to a disabled worker is not absolute; the ADA balances an employee's need for a specific accommodation against the burden on the employer of providing the accommodation. Where that burden becomes an "undue hardship," the employer's obligation ends. 42 U.S.C. § 12112(b)(5)(a); *see id.* § 12182(b)(2)(A)(iii)-(v) (addressing places of public accommodation); *cf. PGA Tour, Inc.* v. *Martin*, 121 S. Ct. 1879, 1893-94 (2001). If the number of individuals entitled to seek reasonable accommodations under the ADA increased exponentially—and a ruling favorable to respondent here would invite that result—the economic costs to employers, not to mention the logistical complications created by competing demands for accommodation, would likewise increase by orders of magnitude. The end result: with vastly more people entitled to seek reasonable accommodations, fewer employers will be able to make those accommodations without undue hardship, and truly disabled people will suffer the consequences. Lowering the threshold of the Act to capture workers who claim limited impairments—but who are otherwise capable of performing life's basic activities—will inexorably siphon off the resources employers can devote to assisting truly disabled persons with a legitimate need for protection under the ADA.

2. Interpreting the ADA to provide redress for individuals suffering from limited impairments also upsets the statute's interaction with workers' compensation laws. State and federal workers' compensation laws make up a "statutory system that establishes comprehensive medical and income benefits for employees who suffer work-related injuries." Joan T. A. Gabel, *et al.*, *The New Relationship Between Injured Worker and Employer: An Opportunity for Restructuring the System*, 35 Am. Bus. L.J. 403, 403 (1998). The ADA and workers' compensation laws coexist uneasily. As one commentator has noted, "[t]he workers' compensation system focuses on the extent to which an injured worker cannot perform his or her job * * * . The ADA, in contrast, is designed to obtain the highest possible productivity a disabled individual can offer." *Id.* at 415.

Acknowledging the tension between the two statutory systems, the EEOC has gone to some lengths to explain the difference in scope and purpose of the ADA and workers' compensation laws. *See EEOC Guidance on Workers' Compensation and ADA*, 8 FEP Manual (BNA) 405:7391-405:7403; *EEOC Technical Assistance Manual on the Employment Provisions (Title I) of the Americans With Disabilities Act*, 8 FEP Manual (BNA) 405:7055, at §§ 9.1-9.8. The Commission has made clear, for example, that impairments giving rise to a workers' compensation claim will not trigger the ADA unless they are "severe enough to substantially limit a major life activity," and that the ADA "does not require an employer to provide a reasonable accommodation for an employee with an occupational injury who does not have a disability as defined by the ADA." *EEOC: Guidance on Workers' Compensation and ADA*, 8 FEP Manual (BNA) at 405:7391, 405:7399. Accordingly, workers' compensation laws often capture employees whose impairments place them below the ADA's "floor"—*i.e.*, those who have work-related injuries, but who cannot show that those injuries significantly limit a major life activity. *Cf.*

Penny v. *United Parcel Serv.*, 128 F.3d 408, 415-416 (6th Cir. 1997) (plaintiff who had received workers' compensation for prior on-the-job injury was not disabled under ADA).[11]

When the Sixth Circuit lowered the bar for ADA claims, allowing plaintiffs to claim that their limited occupational injuries render them "disabled," it effectively eradicated the careful balance between the purpose and scope of the two remedial systems. Before the Sixth Circuit's decision, an employee did not automatically come under the ADA's protection by dint of an occupational injury. If respondent's view of the law prevails, however, the two spheres will converge: any occupational injury affecting an employee's ability to perform unique, job-related manual tasks will likely trigger the ADA, turning the statute into a de facto rider accompanying all state and federal workers' compensation laws. The practical effect of the Sixth Circuit's decision, if it is upheld, will be profoundly felt by employers asked to

[11] Another statute protects some individuals above the "ceiling" set by the ADA—those who cannot show that their disabilities can be reasonably accommodated at work. The Social Security Act "provides monetary benefits to every insured individual who is 'under a disability.' " *Cleveland* v. *Policy Mgmt. Sys. Corp.*, 526 U.S. 795, 801 (1999) (quoting 42 U.S.C. § 423(a)(1)). That Act defines "disability" as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months." 42 U.S.C. § 423(d)(1)(A). By conferring benefits on (among others) those whose severe disabilities cannot be reasonably accommodated by employers, the Social Security Act, like workers' compensation statutes, protects individuals outside the purview of the ADA. *Cf. Cleveland*, 526 U.S. at 805. While some overlap between the statutory fields exists, the ADA is designed to protect individuals between those two poles—those who are more than impaired, and less than completely disabled.

compensate *and* accommodate a brand-new privileged subclass of impaired—but not disabled—employees.

* * * *

The Sixth Circuit overturned the District Court's grant of summary judgment in favor of TMMK because it concluded that Williams's inability to perform the discrete tasks associated with her particular job established that she was substantially limited in the major life activity of performing manual tasks. For the reasons we have explained, such a specific and partial limitation simply does not demonstrate—nor does it give rise to any reasonable inference—that Williams is significantly restricted in a basic life function. Accordingly, the Sixth Circuit's ruling should be reversed and the District Court's award of summary judgment reinstated.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

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STATUTORY AND REGULATORY ADDENDUM

42 U.S.C. § 12101 provides:

§ 12101. Findings and purpose

(a) Findings

The Congress finds that—

(1) some 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older;

(2) historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem;

(3) discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services;

(4) unlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, religion, or age, individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination;

(5) individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities;

(6) census data, national polls, and other studies have documented that people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally;

(7) individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society;

(8) the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals; and

(9) the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and non-productivity.

(b) Purpose

It is the purpose of this chapter—

(1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;

(2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;

(3) to ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities; and

(4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

42 U.S.C. § 12102 provides:

§ 12102. Definitions

As used in this chapter:

(1) Auxiliary aids and services

The term "auxiliary aids and services" includes—

(A) qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing impairments;

(B) qualified readers, taped texts, or other effective methods of making visually delivered materials available to individuals with visual impairments;

(C) acquisition or modification of equipment or devices; and

(D) other similar services and actions.

(2) Disability

The term "disability" means, with respect to an individual—

(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(B) a record of such an impairment; or

(C) being regarded as having such an impairment.

(3) State

The term "State" means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, the Trust Territory of the Pacific Islands, and the Commonwealth of the Northern Mariana Islands.

42 U.S.C. § 12111 provides:

§ 12111. Definitions

As used in this subchapter:

(1) Commission

The term "Commission" means the Equal Employment Opportunity Commission established by section 2000e-4 of this title.

(2) Covered entity

The term "covered entity" means an employer, employment agency, labor organization, or joint labor-management committee.

(3) Direct threat

The term "direct threat" means a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation.

(4) Employee

The term "employee" means an individual employed by an employer. With respect to employment in a foreign country, such term includes an individual who is a citizen of the United States.

(5) Employer

(A) In general

The term "employer" means a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person, except that, for two years following the effective date of this subchapter, an employer means a person engaged in an industry affecting commerce who has 25 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding year, and any agent of such person.

(B) Exceptions

The term "employer" does not include—

(i) the United States, a corporation wholly owned by the government of the United States, or an Indian tribe; or

(ii) a bona fide private membership club (other than a labor organization) that is exempt from taxation under section 501(c) of title 26.

(6) Illegal use of drugs

(A) In general

The term "illegal use of drugs" means the use of drugs, the possession or distribution of which is unlawful under the Controlled Substances Act (21 U.S.C. 801 et seq.). Such term does not include the use of a drug taken under supervision by a licensed health care professional, or other uses authorized by the Controlled Substances Act or other provisions of Federal law.

(B) Drugs

The term "drug" means a controlled substance, as defined in schedules I through V of section 202 of the Controlled Substances Act (21 U.S.C. 812).

(7) Person, etc.

The terms "person", "labor organization", "employment agency", "commerce", and "industry affecting commerce", shall have the same meaning given such terms in section 2000e of this title.

(8) Qualified individual with a disability

The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purposes of this subchapter, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.

(9) Reasonable accommodation

The term "reasonable accommodation" may include—

(A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and

(B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

(10) Undue hardship

(A) In general

The term "undue hardship" means an action requiring significant difficulty or expense, when considered in light of the factors set forth in subparagraph (B).

(B) Factors to be considered

In determining whether an accommodation would impose an undue hardship on a covered entity, factors to be considered include—

(i) the nature and cost of the accommodation needed under this chapter;

(ii) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility;

(iii) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and

(iv) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.

42 U.S.C. § 12112 provides:

§ 12112. Discrimination

(a) General rule

No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

(b) Construction

As used in subsection (a) of this section, the term "discriminate" includes—

(1) limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee;

(2) participating in a contractual or other arrangement or relationship that has the effect of subjecting a covered entity's qualified applicant or employee with a disability to the discrimination prohibited by this subchapter (such relationship includes a relationship with an employment or referral agency, labor union, an organization providing fringe benefits to an employee of the covered entity, or an organization providing training and apprenticeship programs);

(3) utilizing standards, criteria, or methods of administration—

(A) that have the effect of discrimination on the basis of disability; or

(B) that perpetuate the discrimination of others who are subject to common administrative control;

(4) excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association;

(5)(A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity; or

(B) denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant;

(6) using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity; and

(7) failing to select and administer tests concerning employment in the most effective manner to ensure that, when such test is administered to a job applicant or employee who has a disability that impairs sensory, manual, or speaking skills, such test results accurately reflect the skills, aptitude, or whatever other factor of such applicant or employee that such test purports to measure, rather than reflecting the impaired sensory, manual, or speaking skills of such employee or applicant (except where such skills are the factors that the test purports to measure).

(c) Covered entities in foreign countries

(1) In general

It shall not be unlawful under this section for a covered entity to take any action that constitutes discrimination under this section with respect to an employee in a workplace in a foreign country if compliance with this section would cause such covered entity to violate the law of the foreign country in which such workplace is located.

(2) Control of corporation

(A) Presumption

If an employer controls a corporation whose place of incorporation is a foreign country, any practice that constitutes discrimination under this section and is engaged in by such corporation shall be presumed to be engaged in by such employer.

(B) Exception

This section shall not apply with respect to the foreign operations of an employer that is a foreign person not controlled by an American employer.

(C) Determination

For purposes of this paragraph, the determination of whether an employer controls a corporation shall be based on—

(i) the interrelation of operations;

(ii) the common management;

(iii) the centralized control of labor relations; and

(iv) the common ownership or financial control, of the employer and the corporation.

(d) Medical examinations and inquiries

(1) In general

The prohibition against discrimination as referred to in subsection (a) of this section shall include medical examinations and inquiries.

(2) Preemployment

(A) Prohibited examination or inquiry

Except as provided in paragraph (3), a covered entity shall not conduct a medical examination or make inquiries of a job applicant as to whether such applicant is an individual with a disability or as to the nature or severity of such disability.

(B) Acceptable inquiry

A covered entity may make preemployment inquiries into the ability of an applicant to perform job-related functions.

(3) Employment entrance examination

A covered entity may require a medical examination after an offer of employment has been made to a job applicant and prior to the commencement of the employment duties of such applicant, and may condition an offer of employment on the results of such examination, if—

(A) all entering employees are subjected to such an examination regardless of disability;

(B) information obtained regarding the medical condition or history of the applicant is collected and maintained on separate forms and in separate medical files and is treated as a confidential medical record, except that—

(i) supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations;

(ii) first aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment; and

(iii) government officials investigating compliance with this chapter shall be provided relevant information on request; and

(C) the results of such examination are used only in accordance with this subchapter.

(4) Examination and inquiry

(A) Prohibited examinations and inquiries

A covered entity shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity.

(B) Acceptable examinations and inquiries

A covered entity may conduct voluntary medical examinations, including voluntary medical histories, which are part of an employee health program available to employees at that work site. A covered entity may make inquiries into the ability of an employee to perform job-related functions.

(C) Requirement

Information obtained under subparagraph (B) regarding the medical condition or history of any employee are subject to the requirements of subparagraphs (B) and (C) of paragraph (3).

42 U.S.C. § 12113 provides:

§ 12113. Defenses

(a) In general

It may be a defense to a charge of discrimination under this chapter that an alleged application of qualification standards, tests, or selection criteria that screen out or tend to screen out or otherwise deny a job or benefit to an individual with a disability has been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation, as required under this subchapter.

(b) Qualification standards

The term "qualification standards" may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace.

(c) Religious entities

(1) In general

This subchapter shall not prohibit a religious corporation, association, educational institution, or society from giving preference in employment to individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.

(2) Religious tenets requirement

Under this subchapter, a religious organization may require that all applicants and employees conform to the religious tenets of such organization.

(d) List of infectious and communicable diseases

(1) In general

The Secretary of Health and Human Services, not later than 6 months after July 26, 1990, shall—

(A) review all infectious and communicable diseases which may be transmitted through handling the food supply;

(B) publish a list of infectious and communicable diseases which are transmitted through handling the food supply;

(C) publish the methods by which such diseases are transmitted; and

(D) widely disseminate such information regarding the list of diseases and their modes of transmissability[1] to the general public.

Such list shall be updated annually.

(2) Applications

In any case in which an individual has an infectious or communicable disease that is transmitted to others through the handling of food, that is included on the list developed by the Secretary of Health and Human Services under paragraph (1), and which cannot be eliminated by reasonable accommodation, a covered entity may refuse to assign or continue to assign such individual to a job involving food handling.

(3) Construction

Nothing in this chapter shall be construed to preempt, modify, or amend any State, county, or local law, ordinance, or regulation applicable to food handling which is designed to protect the public health from individuals who pose a significant risk to the health or safety of others, which cannot

[1] So in original. Probably should be "transmissibility".

be eliminated by reasonable accommodation, pursuant to the list of infectious or communicable diseases and the modes of transmissability[1] published by the Secretary of Health and Human Services.

42 U.S.C. § 12116 provides:

§ 12116. Regulations

Not later than 1 year after July 26, 1990, the Commission shall issue regulations in an accessible format to carry out this subchapter in accordance with subchapter II of chapter 5 of title 5.

42 U.S.C. § 12117 provides:

§ 12117. Enforcement

(a) Powers, remedies, and procedures

The powers, remedies, and procedures set forth in sections 2000e-4, 2000e-5, 2000e-6, 2000e-8, and 2000e-9 of this title shall be the powers, remedies, and procedures this subchapter provides to the Commission, to the Attorney General, or to any person alleging discrimination on the basis of disability in violation of any provision of this chapter, or regulations promulgated under section 12116 of this title, concerning employment.

(b) Coordination

The agencies with enforcement authority for actions which allege employment discrimination under this subchapter and under the Rehabilitation Act of 1973 (29 U.S.C. 701 et seq.) shall develop procedures to ensure that administrative complaints filed under this subchapter and under the Rehabilitation Act of 1973 are dealt with in a manner that avoids duplication of effort and prevents imposition of inconsistent or conflicting standards for the same requirements under this

[1] So in original. Probably should be "transmissibility".

subchapter and the Rehabilitation Act of 1973. The Commission, the Attorney General, and the Office of Federal Contract Compliance Programs shall establish such coordinating mechanisms (similar to provisions contained in the joint regulations promulgated by the Commission and the Attorney General at part 42 of title 28 and part 1691 of title 29, Code of Federal Regulations, and the Memorandum of Understanding between the Commission and the Office of Federal Contract Compliance Programs dated January 16, 1981 (46 Fed. Reg. 7435, January 23, 1981)) in regulations implementing this subchapter and Rehabilitation Act of 1973 not later than 18 months after July 26, 1990.

Selected Portions of Title 29 of the Code of Federal Regulations, Part 1630:

PART 1630—REGULATIONS TO IMPLEMENT THE EQUAL EMPLOYMENT PROVISIONS OF THE AMERICANS WITH DISABILITIES ACT

§ 1630.1 Purpose, applicability, and construction.

(a) *Purpose.* The purpose of this part is to implement title I of the Americans with Disabilities Act (42 U.S.C. 12101, *et seq.*) (ADA), requiring equal employment opportunities for qualified individuals with disabilities, and sections 3(2), 3(3), 501, 503, 506(e), 508, 510, and 511 of the ADA as those sections pertain to the employment of qualified individuals with disabilities.

(b) *Applicability.* This part applies to "covered entities" as defined at § 1630.2(b).

(c) *Construction*—(1) *In general.* Except as otherwise provided in this part, this part does not apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973 (29 U.S.C. 790-794a), or the regulations issued by the Federal agencies pursuant to that title.

(2) *Relationship to other laws.* This part does not invalidate or limit the remedies, rights, and procedures of any Federal law or law of any State or political subdivision of any State or jurisdiction that provides greater or equal protection for the rights of individuals with disabilities than are afforded by this part.

§ 1630.2 Definitions.

(a) *Commission* means the Equal Employment Opportunity Commission established by section 705 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-4).

(b) *Covered Entity* means an employer, employment agency, labor organization, or joint labor management committee.

(c) *Person, labor organization, employment agency, commerce and industry affecting commerce* shall have the same meaning given those terms in section 701 of the Civil Rights Act of 1964 (42 U.S.C. 2000e).

* * *

(e) *Employer*—(1) *In general.* The term employer means a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person, except that, from July 26, 1992 through July 25, 1994, an employer means a person engaged in an industry affecting commerce who has 25 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding year and any agent of such person.

(2) *Exceptions.* The term employer does not include—

(i) The United States, a corporation wholly owned by the government of the United States, or an Indian tribe; or

(ii) A bona fide private membership club (other than a labor organization) that is exempt from taxation under section 501(c) of the Internal Revenue Code of 1986.

(f) *Employee* means an individual employed by an employer.

(g) *Disability* means, with respect to an individual—

(1) A physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(2) A record of such an impairment; or

(3) Being regarded as having such an impairment. (See § 1630.3 for exceptions to this definition).

(h) *Physical or mental impairment* means:

(1) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine; or

(2) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

(i) *Major Life Activities* means functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

(j) *Substantially limits*—(1) The term *substantially limits* means:

(i) Unable to perform a major life activity that the average person in the general population can perform; or

(ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.

(2) The following factors should be considered in determining whether an individual is substantially limited in a major life activity:

(i) The nature and severity of the impairment;

(ii) The duration or expected duration of the impairment; and

(iii) The permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment.

(3) With respect to the major life activity of *working*—

(i) The term *substantially limits* means significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.

(ii) In addition to the factors listed in paragraph (j)(2) of this section, the following factors may be considered in determining whether an individual is substantially limited in the major life activity of "working":

(A) The geographical area to which the individual has reasonable access;

(B) The job from which the individual has been disqualified because of an impairment, and the number and types of jobs utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is

also disqualified because of the impairment (class of jobs); and/or

(C) The job from which the individual has been disqualified because of an impairment, and the number and types of other jobs not utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (broad range of jobs in various classes).

* * *

(m) *Qualified individual with a disability* means an individual with a disability who satisfies the requisite skill, experience, education and other job-related requirements of the employment position such individual holds or desires, and who, with or without reasonable accommodation, can perform the essential functions of such position. (See § 1630.3 for exceptions to this definition).

* * *

(o) *Reasonable accommodation.* (1) The term *reasonable accommodation* means:

(i) Modifications or adjustments to a job application process that enable a qualified applicant with a disability to be considered for the position such qualified applicant desires; or

(ii) Modifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable a qualified individual with a disability to perform the essential functions of that position; or

(iii) Modifications or adjustments that enable a covered entity's employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities.

(2) *Reasonable accommodation* may include but is not limited to:

(i) Making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and

(ii) Job restructuring; part-time or modified work schedules; reassignment to a vacant position; acquisition or modifications of equipment or devices; appropriate adjustment or modifications of examinations, training materials, or policies; the provision of qualified readers or interpreters; and other similar accommodations for individuals with disabilities.

(3) To determine the appropriate reasonable accommodation it may be necessary for the covered entity to initiate an informal, interactive process with the qualified individual with a disability in need of the accommodation. This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations.

(p) *Undue hardship*—(1) *In general. Undue hardship* means, with respect to the provision of an accommodation, significant difficulty or expense incurred by a covered entity, when considered in light of the factors set forth in paragraph (p)(2) of this section.

(2) *Factors to be considered.* In determining whether an accommodation would impose an undue hardship on a covered entity, factors to be considered include:

(i) The nature and net cost of the accommodation needed under this part, taking into consideration the availability of tax credits and deductions, and/or outside funding;

(ii) The overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation, the number of persons employed at such facility, and the effect on expenses and resources;

(iii) The overall financial resources of the covered entity, the overall size of the business of the covered entity with respect to the number of its employees, and the number, type and location of its facilities;

(iv) The type of operation or operations of the covered entity, including the composition, structure and functions of the workforce of such entity, and the geographic separateness and administrative or fiscal relationship of the facility or facilities in question to the covered entity; and

(v) The impact of the accommodation upon the operation of the facility, including the impact on the ability of other employees to perform their duties and the impact on the facility's ability to conduct business.

* * *

§ 1630.3 Exceptions to the definitions of "Disability" and "Qualified Individual with a Disability"

(a) The terms *disability* and *qualified individual with a disability* do not include individuals currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use.

* * *

(d) *Disability* does not include:

(1) Transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders;

(2) Compulsive gambling, kleptomania, or pyromania; or

(3) Psychoactive substance use disorders resulting from current illegal use of drugs.

(e) *Homosexuality and bisexuality* are not impairments and so are not disabilities as defined in this part.

§ 1630.4 Discrimination prohibited.

It is unlawful for a covered entity to discriminate on the basis of disability against a qualified individual with a disability in regard to:

(a) Recruitment, advertising, and job application procedures;

(b) Hiring, upgrading, promotion, award of tenure, demotion, transfer, layoff, termination, right of return from layoff, and rehiring;

(c) Rates of pay or any other form of compensation and changes in compensation;

(d) Job assignments, job classifications, organizational structures, position descriptions, lines of progression, and seniority lists;

(e) Leaves of absence, sick leave, or any other leave;

(f) Fringe benefits available by virtue of employment, whether or not administered by the covered entity;

(g) Selection and financial support for training, including: apprenticeships, professional meetings, conferences and other related activities, and selection for leaves of absence to pursue training;

(h) Activities sponsored by a covered entity including social and recreational programs; and

(i) Any other term, condition, or privilege of employment.

The term discrimination includes, but is not limited to, the acts described in §§1630.5 through 1630.13 of this part.

§ 1630.5 Limiting, segregating, and classifying.

It is unlawful for a covered entity to limit, segregate, or classify a job applicant or employee in a way that adversely

affects his or her employment opportunities or status on the basis of disability.

* * *

§ 1630.7 Standards, criteria, or methods of administration.

It is unlawful for a covered entity to use standards, criteria, or methods of administration, which are not job-related and consistent with business necessity, and:

(a) That have the effect of discriminating on the basis of disability; or

(b) That perpetuate the discrimination of others who are subject to common administrative control.

* * *

§ 1630.9 Not making reasonable accommodation.

(a) It is unlawful for a covered entity not to make reasonable accommodation to the known physical or mental limitations of an otherwise qualified applicant or employee with a disability, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of its business.

(b) It is unlawful for a covered entity to deny employment opportunities to an otherwise qualified job applicant or employee with a disability based on the need of such covered entity to make reasonable accommodation to such individual's physical or mental impairments.

(c) A covered entity shall not be excused from the requirements of this part because of any failure to receive technical assistance authorized by section 506 of the ADA, including any failure in the development or dissemination of any technical assistance manual authorized by that Act.

(d) A qualified individual with a disability is not required to accept an accommodation, aid, service, opportunity or benefit which such qualified individual chooses not to accept. However, if such individual rejects a reasonable accommodation, aid, service, opportunity or benefit that is necessary to enable the individual to perform the essential functions of the position held or desired, and cannot, as a result of that rejection, perform the essential functions of the position, the individual will not be considered a qualified individual with a disability.

§ 1630.10 Qualification standards, tests, and other selection criteria.

It is unlawful for a covered entity to use qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities, on the basis of disability, unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity.

* * *

§ 1630.15 Defenses.

Defenses to an allegation of discrimination under this part may include, but are not limited to, the following:

(a) *Disparate treatment charges.* It may be a defense to a charge of disparate treatment brought under §§1630.4 through 1630.8 and 1630.11 through 1630.12 that the challenged action is justified by a legitimate, nondiscriminatory reason.

(b) *Charges of discriminatory application of selection criteria*—(1) *In general.* It may be a defense to a charge of discrimination, as described in Sec. 1630.10, that an alleged application of qualification standards, tests, or selection criteria that screens out or tends to screen out or otherwise

denies a job or benefit to an individual with a disability has been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished with reasonable accommodation, as required in this part.

(2) *Direct threat as a qualification standard.* The term "qualification standard" may include a requirement that an individual shall not pose a direct threat to the health or safety of the individual or others in the workplace. (See § 1630.2(r) defining direct threat.)

(c) *Other disparate impact charges.* It may be a defense to a charge of discrimination brought under this part that a uniformly applied standard, criterion, or policy has a disparate impact on an individual with a disability or a class of individuals with disabilities that the challenged standard, criterion or policy has been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished with reasonable accommodation, as required in this part.

(d) *Charges of not making reasonable accommodation.* It may be a defense to a charge of discrimination, as described in § 1630.9, that a requested or necessary accommodation would impose an undue hardship on the operation of the covered entity's business.

* * *

Selected Portions of Title 29 of the Code of Federal Regulations, Part 1630, Appendix:

APPENDIX TO PART 1630—INTERPRETIVE GUIDANCE ON TITLE I OF THE AMERICANS WITH DISABILITIES ACT

BACKGROUND

The ADA is a federal antidiscrimination statute designed to remove barriers which prevent qualified individuals with

disabilities from enjoying the same employment opportunities that are available to persons without disabilities.

Like the Civil Rights Act of 1964 that prohibits discrimination on the bases of race, color, religion, national origin, and sex, the ADA seeks to ensure access to equal employment opportunities based on merit. It does not guarantee equal results, establish quotas, or require preferences favoring individuals with disabilities over those without disabilities.

However, while the Civil Rights Act of 1964 prohibits any consideration of personal characteristics such as race or national origin, the ADA necessarily takes a different approach. When an individual's disability creates a barrier to employment opportunities, the ADA requires employers to consider whether reasonable accommodation could remove the barrier.

The ADA thus establishes a process in which the employer must assess a disabled individual's ability to perform the essential functions of the specific job held or desired. While the ADA focuses on eradicating barriers, the ADA does not relieve a disabled employee or applicant from the obligation to perform the essential functions of the job. To the contrary, the ADA is intended to enable disabled persons to compete in the workplace based on the same performance standards and requirements that employers expect of persons who are not disabled.

However, where that individual's functional limitation impedes such job performance, an employer must take steps to reasonably accommodate, and thus help overcome the particular impediment, unless to do so would impose an undue hardship. Such accommodations usually take the form of adjustments to the way a job customarily is performed, or to the work environment itself.

This process of identifying whether, and to what extent, a reasonable accommodation is required should be flexible and involve both the employer and the individual with a disability. Of course, the determination of whether an individual is qualified for a particular position must necessarily be made on a case-by-case basis. No specific form of accommodation is guaranteed for all individuals with a particular disability. Rather, an accommodation must be tailored to match the needs of the disabled individual with the needs of the job's essential functions.

This case-by-case approach is essential if qualified individuals of varying abilities are to receive equal opportunities to compete for an infinitely diverse range of jobs. For this reason, neither the ADA nor this part can supply the "correct" answer in advance for each employment decision concerning an individual with a disability. Instead, the ADA simply establishes parameters to guide employers in how to consider, and take into account, the disabling condition involved.

INTRODUCTION

The Equal Employment Opportunity Commission (the Commission or EEOC) is responsible for enforcement of title I of the Americans with Disabilities Act (ADA), 42 U.S.C. 12101 et seq. (1990), which prohibits employment discrimination on the basis of disability. The Commission believes that it is essential to issue interpretive guidance concurrently with the issuance of this part in order to ensure that qualified individuals with disabilities understand their rights under this part and to facilitate and encourage compliance by covered entities. This appendix represents the Commission's interpretation of the issues discussed, and the Commission will be guided by it when resolving charges of employment discrimination. The appendix addresses the major provisions of this part and explains the major concepts of disability rights.

The terms "employer" or "employer or other covered entity" are used interchangeably throughout the appendix to refer to all covered entities subject to the employment provisions of the ADA.

Section 1630.1 Purpose, Applicability and Construction

Section 1630.1(a) Purpose

The Americans with Disabilities Act was signed into law on July 26, 1990. It is an antidiscrimination statute that requires that individuals with disabilities be given the same consideration for employment that individuals without disabilities are given. An individual who is qualified for an employment opportunity cannot be denied that opportunity because of the fact that the individual is disabled. The purpose of title I and this part is to ensure that qualified individuals with disabilities are protected from discrimination on the basis of disability.

The ADA uses the term "disabilities" rather than the term "handicaps" used in the Rehabilitation Act of 1973, 29 U.S.C. 701-796. Substantively, these terms are equivalent. As noted by the House Committee on the Judiciary, "[t]he use of the term 'disabilities' instead of the term 'handicaps' reflects the desire of the Committee to use the most current terminology. It reflects the preference of persons with disabilities to use that term rather than 'handicapped' as used in previous laws, such as the Rehabilitation Act of 1973 * * *." H.R. Rep. No. 485 part 3, 101st Cong., 2d Sess. 26-27 (1990) (hereinafter House Judiciary Report); see also S. Rep. No. 116, 101st Cong., 1st Sess. 21 (1989) (hereinafter Senate Report); H.R. Rep. No. 485 part 2, 101st Cong., 2d Sess. 50-51 (1990) [hereinafter House Labor Report].

The use of the term "Americans" in the title of the ADA is not intended to imply that the Act only applies to United States citizens. Rather, the ADA protects all qualified indi-

viduals with disabilities, regardless of their citizenship status or nationality.

Section 1630.1(b) and (c) Applicability and Construction

Unless expressly stated otherwise, the standards applied in the ADA are not intended to be lesser than the standards applied under the Rehabilitation Act of 1973.

* * *

Section 1630.2(g) Disability

In addition to the term "covered entity," there are several other terms that are unique to the ADA. The first of these is the term "disability." Congress adopted the definition of this term from the Rehabilitation Act definition of the term "individual with handicaps." By so doing, Congress intended that the relevant caselaw developed under the Rehabilitation Act be generally applicable to the term "disability" as used in the ADA. Senate Report at 21; House Labor Report at 50; House Judiciary Report at 27.

The definition of the term "disability" is divided into three parts. An individual must satisfy at least one of these parts in order to be considered an individual with a disability for purposes of this part. An individual is considered to have a "disability" if that individual either (1) has a physical or mental impairment which substantially limits one or more of that person's major life activities, (2) has a record of such an impairment, or, (3) is regarded by the covered entity as having such an impairment. To understand the meaning of the term "disability," it is necessary to understand, as a preliminary matter, what is meant by the terms "physical or mental impairment," "major life activity," and "substantially limits." Each of these terms is discussed below.

Section 1630.2(h) Physical or Mental Impairment

This term adopts the definition of the term "physical or mental impairment" found in the regulations implementing section 504 of the Rehabilitation Act at 34 CFR part 104. It defines physical or mental impairment as any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of several body systems, or any mental or psychological disorder.

It is important to distinguish between conditions that are impairments and physical, psychological, environmental, cultural and economic characteristics that are not impairments. The definition of the term "impairment" does not include physical characteristics such as eye color, hair color, left-handedness, or height, weight or muscle tone that are within "normal" range and are not the result of a physiological disorder. The definition, likewise, does not include characteristic predisposition to illness or disease. Other conditions, such as pregnancy, that are not the result of a physiological disorder are also not impairments. Similarly, the definition does not include common personality traits such as poor judgment or a quick temper where these are not symptoms of a mental or psychological disorder. Environmental, cultural, or economic disadvantages such as poverty, lack of education or a prison record are not impairments. Advanced age, in and of itself, is also not an impairment. However, various medical conditions commonly associated with age, such as hearing loss, osteoporosis, or arthritis would constitute impairments within the meaning of this part. See Senate Report at 22-23; House Labor Report at 51-52; House Judiciary Report at 28-29.

Section 1630.2(i) Major Life Activities

This term adopts the definition of the term "major life activities" found in the regulations implementing section 504 of the Rehabilitation Act at 34 CFR part 104. "Major life activities" are those basic activities that the average person in the general population can perform with little or no difficulty.

Major life activities include caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. This list is not exhaustive. For example, other major life activities include, but are not limited to, sitting, standing, lifting, reaching. See Senate Report at 22; House Labor Report at 52; House Judiciary Report at 28.

Section 1630.2(j) Substantially Limits

Determining whether a physical or mental impairment exists is only the first step in determining whether or not an individual is disabled. Many impairments do not impact an individual's life to the degree that they constitute disabling impairments. An impairment rises to the level of disability if the impairment substantially limits one or more of the individual's major life activities. Multiple impairments that combine to substantially limit one or more of an individual's major life activities also constitute a disability.

The ADA and this part, like the Rehabilitation Act of 1973, do not attempt a "laundry list" of impairments that are "disabilities." The determination of whether an individual has a disability is not necessarily based on the name or diagnosis of the impairment the person has, but rather on the effect of that impairment on the life of the individual. Some impairments may be disabling for particular individuals but not for others, depending on the stage of the disease or disorder, the presence of other impairments that combine to make the impairment disabling or any number of other factors.

Other impairments, however, such as HIV infection, are inherently substantially limiting.

On the other hand, temporary, non-chronic impairments of short duration, with little or no long term or permanent impact, are usually not disabilities. Such impairments may include, but are not limited to, broken limbs, sprained joints, concussions, appendicitis, and influenza. Similarly, except in

rare circumstances, obesity is not considered a disabling impairment.

An impairment that prevents an individual from performing a major life activity substantially limits that major life activity. For example, an individual whose legs are paralyzed is substantially limited in the major life activity of walking because he or she is unable, due to the impairment, to perform that major life activity.

Alternatively, an impairment is substantially limiting if it significantly restricts the duration, manner or condition under which an individual can perform a particular major life activity as compared to the average person in the general population's ability to perform that same major life activity. Thus, for example, an individual who, because of an impairment, can only walk for very brief periods of time would be substantially limited in the major life activity of walking. It should be noted that the term "average person" is not intended to imply a precise mathematical "average."

Part 1630 notes several factors that should be considered in making the determination of whether an impairment is substantially limiting. These factors are (1) the nature and severity of the impairment, (2) the duration or expected duration of the impairment, and (3) the permanent or long term impact, or the expected permanent or long term impact of, or resulting from, the impairment. The term "duration," as used in this context, refers to the length of time an impairment persists, while the term "impact" refers to the residual effects of an impairment. Thus, for example, a broken leg that takes eight weeks to heal is an impairment of fairly brief duration. However, if the broken leg heals improperly, the "impact" of the impairment would be the resulting permanent limp. Likewise, the effect on cognitive functions resulting from traumatic head injury would be the "impact" of that impairment.

The determination of whether an individual is substantially limited in a major life activity must be made on a case by case basis. An individual is not substantially limited in a major life activity if the limitation, when viewed in light of the factors noted above, does not amount to a significant restriction when compared with the abilities of the average person. For example, an individual who had once been able to walk at an extraordinary speed would not be substantially limited in the major life activity of walking if, as a result of a physical impairment, he or she were only able to walk at an average speed, or even at moderately below average speed.

It is important to remember that the restriction on the performance of the major life activity must be the result of a condition that is an impairment. As noted earlier, advanced age, physical or personality characteristics, and environmental, cultural, and economic disadvantages are not impairments. Consequently, even if such factors substantially limit an individual's ability to perform a major life activity, this limitation will not constitute a disability. For example, an individual who is unable to read because he or she was never taught to read would not be an individual with a disability because lack of education is not an impairment. However, an individual who is unable to read because of dyslexia would be an individual with a disability because dyslexia, a learning disability, is an impairment.

If an individual is not substantially limited with respect to any other major life activity, the individual's ability to perform the major life activity of working should be considered. If an individual is substantially limited in any other major life activity, no determination should be made as to whether the individual is substantially limited in working. For example, if an individual is blind, i.e., substantially limited in the major life activity of seeing, there is no need to determine whether the individual is also substantially limited in the major life activity of working. The determination of

whether an individual is substantially limited in working must also be made on a case by case basis.

This part lists specific factors that may be used in making the determination of whether the limitation in working is "substantial." These factors are:

(1) The geographical area to which the individual has reasonable access;

(2) The job from which the individual has been disqualified because of an impairment, and the number and types of jobs utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (class of jobs); and/or

(3) The job from which the individual has been disqualified because of an impairment, and the number and types of other jobs not utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (broad range of jobs in various classes).

Thus, an individual is not substantially limited in working just because he or she is unable to perform a particular job for one employer, or because he or she is unable to perform a specialized job or profession requiring extraordinary skill, prowess or talent. For example, an individual who cannot be a commercial airline pilot because of a minor vision impairment, but who can be a commercial airline co-pilot or a pilot for a courier service, would not be substantially limited in the major life activity of working. Nor would a professional baseball pitcher who develops a bad elbow and can no longer throw a baseball be considered substantially limited in the major life activity of working. In both of these examples, the individuals are not substantially limited in the ability to perform any other major life activity and, with regard to the major life activity of working, are only unable to perform

either a particular specialized job or a narrow range of jobs. See *Forrisi* v. *Bowen*, 794 F.2d 931 (4th Cir. 1986); *Jasany* v. *U.S. Postal Service*, 755 F.2d 1244 (6th Cir. 1985); *E.E Black, Ltd.* v. *Marshall*, 497 F. Supp. 1088 (D. Hawaii 1980).

On the other hand, an individual does not have to be totally unable to work in order to be considered substantially limited in the major life activity of working. An individual is substantially limited in working if the individual is significantly restricted in the ability to perform a class of jobs or a broad range of jobs in various classes, when compared with the ability of the average person with comparable qualifications to perform those same jobs. For example, an individual who has a back condition that prevents the individual from performing any heavy labor job would be substantially limited in the major life activity of working because the individual's impairment eliminates his or her ability to perform a class of jobs. This would be so even if the individual were able to perform jobs in another class, e.g., the class of semi-skilled jobs. Similarly, suppose an individual has an allergy to a substance found in most high rise office buildings, but seldom found elsewhere, that makes breathing extremely difficult. Since this individual would be substantially limited in the ability to perform the broad range of jobs in various classes that are conducted in high rise office buildings within the geographical area to which he or she has reasonable access, he or she would be substantially limited in working.

The terms "number and types of jobs" and "number and types of other jobs," as used in the factors discussed above, are not intended to require an onerous evidentiary showing. Rather, the terms only require the presentation of evidence of general employment demographics and/or of recognized occupational classifications that indicate the approximate number of jobs (*e.g.*, "few," "many," "most") from which an individual would be excluded because of an impairment.

If an individual has a "mental or physical impairment" that "substantially limits" his or her ability to perform one or more "major life activities," that individual will satisfy the first part of the regulatory definition of "disability" and will be considered an individual with a disability. An individual who satisfies this first part of the definition of the term "disability" is not required to demonstrate that he or she satisfies either of the other parts of the definition. However, if an individual is unable to satisfy this part of the definition, he or she may be able to satisfy one of the other parts of the definition.

* * *

Supreme Court, U.S.
FILED
JUN 29 2001
CLERK

No. 00-1089

IN THE
Supreme Court of the United States

TOYOTA MOTOR MANUFACTURING,
KENTUCKY, INC.,

Petitioner,

v.

ELLA WILLIAMS,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED JANUARY 5, 2001
CERTIORARI GRANTED APRIL 16, 2001

Relevant Docket Entries from the United States Court of Appeals for the Sixth Circuit 1

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The appendix to the petition for certiorari contains the following material which is omitted from the Joint Appendix:

Appendix A:

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Appendix B:

Opinion of the Court of Appeals, dated July 10, 2000 ..... 12a

Appendix C:

Memorandum and Opinion of the District Court, dated January 27, 1999 ..... 23a

Appendix D:

Order Denying Rehearing, dated October 12, 2000 ..... 57a

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 99-5234

ELLA WILLIAMS
Plaintiff-Appellant,

v.

TOYOTA MOTOR MANUFACTURING,
KENTUCKY, INC.
Defendant-Appellee.

DOCKET ENTRIES

DATE	FILINGS – PROCEEDINGS
2/24/99	Civil Case Docketed. Notice filed by Appellant Ella Williams. Transcript needed: n (ac)
4/5/99	PROOF BRIEF filed by Leslie Rosenbaum for Appellant Williams. Certificate of service date 4/2/99 Number of Pages: 45 [99-5234] (ac)
5/5/99	PROOF BRIEF filed by Jeffrey A. Savarise for Appellee Toyota Mtr Mfg KY. Certificate of service date 5/4/99. Number of Pages: 39. [99-5234] (ac)
5/20/99	PROOF REPLY BRIEF filed by Leslie Rosenbaum for Appellant Ella Williams. Certificate of service date 5/19/99 [99-5234] (ac)
5/28/99	APPENDIX filed by Leslie Rosenbaum for Appellant Ella Williams. Copies: 5. Certificate of service date 5/26/99 [99-5234] (ac)

6/7/99 FINAL BRIEF filed by Jeffrey A. Savarise for Appellee Toyota Mtr Mfg KY. Copies: 7. Certificate of service date 6/3/99. Number of pages: 41. [99-5234] (ac)

6/16/99 FINAL BRIEF filed by Leslie Rosenbaum for Appellant Ella Williams. Copies: 7. Certificate of service date 6/15/99 Number of Pages: 45. [99-5234] (ac)

6/16/99 FINAL REPLY BRIEF filed by Leslie Rosenbaum for Appellant Ella Williams. Copies: 7. Certificate of service date 6/15/99 Number of Pages: 17. [99-5234] (ac)

2/1/00 CAUSE ARGUED on 2/1/99 by Leslie Rosenbaum for Appellant Ella Williams, Jeffrey A. Savarise for Appellee Toyota Mtr Mfg KY before Judges Merritt, Boggs, Moore. [99-5234] (me)

2/7/00 CERTIFIED RECORD filed. Volumes include 1 Tr; 24 Dep; 10 Pl. [99-5234] (ac)

7/10/00 OPINION filed: The judgment of the district court as to the ruling on plaintiff's ADA claims is REVERSED and remanded for a trial on the merits and AFFIRMED as to the plaintiff's FMLA claim, decision for publication pursuant to local rule 206. [99-5234] Gilbert S. Merritt, Authoring Judge, Danny J. Boggs, Karen N. Moore, Circuit Judges. (Judge Boggs delivered a separate opinion concurring in part and dissenting in part) (ac)

7/10/00 JUDGMENT: REVERSED and remanded and AFFIRMED. (ac)

7/21/00 PETITION for en banc rehearing filed by Jeffrey A. Savarise for Appellee Toyota Mtr

Mfg KY. Certificate of service date 7/20/00. [99-5234] (blh)

7/24/00 ADDITIONAL PETITION for rehearing before original panel filed by Leslie Rosenbaum for Appellant Ella Williams. Certificate of service date 7/24/00. [99-5234] (ac)

8/29/00 AMENDED OPINION filed: It is ordered that the judgment of the district court as to the plaintiff's FMLA claim for wrongful termination is AFFIRMED and it is further ordered that the district court's ruling as to the plaintiff's ADA claim for failure to accommodate is REVERSED and remanded, decision for publication pursuant to local rule 206. [99-5234] Gilbert S. Merritt, Authoring Judge, Danny J. Boggs, Karen N. Moore, Circuit Judges. (Judge Boggs delivered a separate opinion concurring in part and dissenting in part) (ac)

8/29/00 AMENDED JUDGMENT: AFFIRMED: REVERSED and remanded. (ac)

8/29/00 LETTER SENT by blh to Jeffrey A. Savarise for Appellee Toyota Mtr Mfg KY, Leslie Rosenbaum for Appellant Ella Williams notifying that party is to advise the court whether petition for rehearing is to be withdrawn. If it is not, the appellee will have until 9/12/00 to file a memorandum of law supplementing its original petition. If the appellant wishes to seek en banc reconsideration, her petition is due by 9/12/00 [99-5234]. (blh)

9/12/00 Appellee RESPONSE filed advising the petition for rehearing en banc is not withdrawn; they believe a supplemental memorandum is unnecessary; they stand by the original petition. Response from Jeffrey A. Savarise for

	Appellee Toyota Mtr Mfg KY. Certificate of service date 9/11/00 [99-5234] (blh)
10/12/00	ORDER filed denying petition for en banc rehearing [2191408-1] filed by Jeffrey A. Savarise [99-5234]. Gilbert S. Merritt, Danny J. Boggs, Karen N. Moore, Circuit Judges. (blh)
10/20/00	MANDATE ISSUED with no cost taxed [99-5234] (ac)
10/26/00	ORDER filed recalling mandate. [99-5234] (ac)
10/26/00	ORDER filed denying petition for rehearing before original panel filed by Leslie Rosenbaum. [99-5234] Gilbert S. Merritt, Danny J. Boggs, Karen N. Moore, Circuit Judges. (ac)
11/3/00	MANDATE ISSUED with no cost taxed [99-5234] (ac)
1/11/01	U.S. Supreme Court notice filed regarding petition for writ of certiorari filed by Appellee Toyota Mtr Mfg KY. Filed in the Supreme Court on 01-05-01, Supreme Ct. case number: 00-1089. [99-5234] (swh)
4/18/01	U.S. Supreme Court letter filed granting petition for writ of certiorari [2286590-1] filed by Toyota Mtr Mfg KY and granting motion by National Association of Mfgs. to file amicus brief. [99-5234]. Filed in the Supreme Court on 04-16-01. (swh)

U.S. DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY (LEXINGTON)

CIVIL DOCKET FOR CASE #: 97-CV-135

ELLA WILLIAMS

Plaintiff,

v.

TOYOTA MOTOR MANUFACTURING, KENTUCKY, INC.

Defendant.

DOCKET ENTRIES

DATE	NO.	PROCEEDINGS
4/18/97	1	COMPLAINT (1 summons(es) issued) with copy, Fee Paid $150., Receipt No. 065924 (skv) [Entry date 04/21/97]
4/29/97	2	ANSWER by defendant Toyota Motor Mfg to COMPLAINT [1-1] (skv) [Entry date 04/30/97]
10/3/97	16	STIPULATION by parties deposition taken 6/27/97 in the Workers' Compensation proceeding styled Ella F. Williams v. Toyota Motor Manufacturing, Kentucky, Inc and Special Fund, Case No. 97-01035 is admitted in instant action as if taken in this action w/ COPY OF DEPOSITION

ATTACHED (skv) [Entry date 10/06/97] [Edit date 10/06/97]

10/3/97 17 DEPOSITION of ELLA FREDA WILLIAMS taken on the following date(s): 9/12/97 @ 9:10 a.m. by: Dft. (SEP. VOL.) (skv) [Entry date 10/06/97]

11/21/97 24 DEPOSITION of Mr. David Price taken on the following date(s): 11/6/97 @ 9:40 a.m. by: pltf. (SEP. VOL.) (skv) [Entry date 11/24/97]

12/15/97 29 MOTION by plaintiff Ella Williams to amend complaint w/ tendered amended complaint attached (skv) [Entry date 12/16/97]

12/30/97 32 BRIEF IN OPPOSITION by defendant Toyota Motor Mfg KY to plaintiff's motion to amend complaint [29-1] (skv) [Entry date 01/08/98]

1/14/98 48 ORDER by Judge Henry R. Wilhoit Jr.: 1) plaintiff's motion to amend complaint [29-1] SUSTAINED; 2) Clerk FILE tendered Amended Complaint as of date of entry of this Order (cc: all counsel) (skv)

1/14/98 49 AMENDED COMPLAINT [1-1] by plaintiff Ella Williams; jury demand (skv)

1/21/98 55 ANSWER by defendant Toyota Motor Mfg KY to AMENDED COMPLAINT [49-1] (skv) [Entry date 01/22/98]

4/30/98 99 MOTION by defendant Toyota Motor Mfg KY for summary judgment (seal) [Entry date 05/01/98]

4/30/98 100 MEMORANDUM by defendant Toyota Motor Mfg KY in support of motion for summary judgment [99-1] (seal) [Entry date 05/01/98]

4/30/98 101 APPENDIX LIST re: Toyota's motion for summary judgment (sep. vol.) (seal) [Entry date 05/01/98]

5/1/98 103 MOTION by plaintiff Ella Williams for partial summary judgment w/ attached memo in support (seal)

5/15/98 108 MEMORANDUM IN OPPOSITION by plaintiff Ella Williams to motion of Toyota Motor Manufacturing, Kentucky Inc. for summary judgment [99-1] (skv) [Entry date 05/18/98]

5/19/98 111 MEMORANDUM IN OPPOSITION by defendant Toyota Motor Mfg KY to plaintiff's motion for partial summary judgment [103-1] w/ exhibits placed in sep. vol. (skv) [Entry date 05/20/98]

5/28/98 115 REPLY by defendant Toyota Motor Mfg KY to Memorandum in opposition to motion dft's motion for summary judgment [108-1] (lgb) [Entry date 06/02/98]

6/1/98 117 REPLY by plaintiff Ella Williams to response to motion for partial summary judgment [103-1] (mst) [Entry date 06/02/98]

7/1/98	127	SUPPLEMENTAL BRIEF IN OPPOSITION by plaintiff Ella Williams to defendant's motion for summary judgment [99-1] (skv)
7/15/98	132	REPLY by defendant Toyota Motor Mfg KY to plaintiff's Supplemental brief in opposition to defendant's motion for summary judgment [99-1] (skv)
7/20/98	133	SUPPLEMENTAL MEMORANDUM IN OPPOSITION by defendant Toyota Motor Mfg KY to plaintiff's motion for partial summary judgment [103-1] (skv) [Entry date 07/21/98]
7/31/98	136	(REPLY) RESPONSE TO DEFENDANTS SUPPLEMENTAL MEMORANDUM by plaintiff Ella Williams to response to motion for partial summary judgment [103-1] (mst)
9/2/98	138	SUPPLEMENTAL MEMORANDUM by defendant Toyota Motor Mfg KY in support of motion for summary judgment [99-1] (skv) [Entry date 09/03/98]
9/8/98	140	MEMORANDUM IN OPPOSITION by plaintiff Ella Williams to defendant's Supplemental Memorandum in support of its motion for summary judgment [99-1] (skv)
1/5/99	156	SECOND SUPPLEMENTAL MEMORANDUM IN OPPOSITION by defendant Toyota Motor Mfg KY to plaintiff's motion for partial summary judgment [103-1] (skv) [Entry date 01/06/99]

1/26/99	158	MEMORANDUM & ORDER by Chief Judge Henry R. Wilhoit Jr: 1) dft's motion for summary judgment [99-1] GRANTED; 2) plaintiff's motion for partial summary judgment [103-1] denied as MOOT; 3) defendant's motions in limine [96-1] and [147-1] denied as MOOT; 4) action is dismissed with prejudice and shall be STRICKEN from docket; and 4) this is final and appealable and order (cc: all counsel) (seal) [Entry date 01/27/99] [Edit date 01/27/99]
1/27/99	159	JUDGMENT by Chief Judge Henry R. Wilhoit Jr: 1) Dft's motion for summary judgment GRANTED; 2) pltf's motion for partial summary judgment denied as MOOT; 3) dft's motions in limine denied as MOOT; 4) action dismissed with prejudice and stricken from docket; and 5) this is final and appealable order (cc: all counsel) (seal)
2/18/99	160	NOTICE OF APPEAL by plaintiff Ella Williams from Dist. Court decision [159-1], [158-2] (cc: all counsel) (mst) [Edit date 10/27/00]
10/23/00	164	MANDATE from 6CCA reversing and remanding the Decision of the District Court [Appeal [160-1] (mst)
10/27/00	165	CERTIFIED COPY of 6CCA Order: Mandate issued 10/20/00 is RECALLED. (mst)
11/6/00	166	MANDATE from 6CCA reversing and remanding the Decision of the District Court [Appeal [160-1] (mst)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON DIVISION
CIVIL ACTION NO. 97-135

ELLA WILLIAMS

Plaintiff,

v.

TOYOTA MOTOR MANUFACTURING, KENTUCKY, INC.

Defendant.

The deposition of ELLA FREDA WILLIAMS was taken on behalf of the defendant before MARYBETH C. SOWARDS, Reporter and Notary Public in and for the State of Kentucky at Large, at the law offices of Greenebaum, Doll & McDonald located at 333 West Vine Street, Lexington, Kentucky, on Friday, September 12, 1997, commencing at the approximate hour of 9:10 a.m.

Said deposition was taken pursuant to notice previously filed, pursuant to the Federal Rules of Civil Procedure, in the above-styled action now pending before the United States District Court, Lexington division.

remember it as being 20 pounds.

Q 44 Do you recall a ten-pound frequent lifting maximum?

A No.

Q 45 Do you recall any frequent lifting limitations based on the doctor's restrictions?

A Yes, there was some.

Q 46 But you just don't remember what it was?

A I don't remember exactly how it is.

Q 47 Now, Ms. Williams, for the record, you developed your carpal tunnel conditions in 1991?

A Yes.

Q 48 And from 1992 to December of 1993, you worked in various modified duty jobs and you also spent a lot of time on medical leave of absence for the condition?

A I don't remember exactly how that goes. It's all in the file. It should be.

Q 49 Well, I'm not asking you to remember exactly. I'm just saying you did work—well, let me break it down. You worked on modified duty at some point during that two-year period?

A Yes.

Q 50 And you were on medical leaves of absence at some point during that two-year period?

A Yes.

Q 51 And at the time you returned to work in December of 1993, you were returning from a medical leave of absence?

A Yes.

Q 52 Can you recall at this time how long you had been off on a medical leave at that point?

A No.

Q 53 And I understand that it's kind of hard to remember, but do you think it was more than a month that you had been off?

A Yes.

Q 54 More than two months?

A Yes.

Q 55 More than six months?

A Yes.

Q 56 More than a year? Less than a year?

A I'm not sure on that, what the time was.

Q 57 So more than six months is about the best you can recall?

A Yes.

Q 58 Now at that time your carpal tunnel, bilateral carpal tunnel—and I guess for the record, bilateral simply means in both hands or both wrists; is that correct?

A Yes.

Q 59 At that time carpal tunnel didn't interfere or limit you in any way as far as walking, did it?

A No.

Q 60 Or seeing?

A No.

Q 61 It didn't affect your hearing?

A No.

Q 62 It didn't affect your speaking?

A No.

Q 63 Your breathing?

A No.

Q 64 Your ability to learn, read, those types of things?

A That's correct.

Q 65 And the job that you came back to in 1993 did involve some manual tasks, didn't it?

A Yes.

Q 66 So the impairment didn't substantially limit you in performing manual tasks?

A What I was brought back in on, no.

Q 67 Which was a manual task?

A Yes.

Q 68 And you were able to care for yourself as far as personal hygiene? I mean, you could get dressed in the morning?

A Yes.

Q 69 And brush your teeth, comb your hair?

A Yes.

Q 70 I guess you did a little bit of housework and a little bit of gardening at that time too?

A It was limited.

Q 71 But you were doing some?

A Yes.

Q 72 And you were able to sit and stand?

A Yes.

Q 73 The job, in fact, required you to stand, didn't it?

A Yes.

Q 74 Now within your restrictions you were able to do lifting; correct? I mean, I know that there was a limitation on it, but you were able to lift?

A I didn't do lifting on the job that I returned to.

Q 75 But you weren't restricted from doing all lifting, just the lifting to a certain weight limit; correct?

A That's correct.

Q 76 A weight limit that we can't recall right now, though?

A That's correct.

Q 77 And you were able to do reaching? You could reach as long as it wasn't, what, repetitive with twisting and pinching and so forth?

A Overextension I believe is the way that Dr. Kleinert looks at it.

Q 78 On a repetitive basis?

A True.

Q 79 So to casually reach out and do something, you could do that back in 1993?

A As long as it was nonrepetitive.

Q 80 Right. You said the job that you returned to you weren't required to lift. I don't want to get into a lot before 1993, but just very briefly the jobs you held up to that point—I guess you'd been at Toyota since about 1990, was it?

A Yes.

Q 81 Did they involve lifting, a lot of lifting?

A They varied.

Q 82 Did they involve lifting over 20 pounds, if you can recall?

A I don't know.

Q 83 Did you have many occasions to have to lift over 20 pounds in your home life, nonwork life?

A No.

Q 84 And that's both prior to 1993 and after 1993?

A That's correct.

Q 85 Now with respect to working in December of 1993, you came back to work at Toyota at that time; correct?

A Yes.

Q 86 So you were obviously able to do some work at Toyota then because they found a job for you.

A Yes.

Q 87 And you had worked at Toyota since August of 1990?

A That's correct.

Q 88 So I guess you had been there for about three years, some time on medical leave, but you were somewhat familiar with the jobs at Toyota?

A Yes.

Q 89 You had walked around the plant before, I assume?

A Oh, yes.

Q 90 I guess it's not sort of tunnel vision where when you work at Toyota you walk out to your line and those are the only jobs you've ever seen in the plant.

A. No.

Q 91 So you're somewhat familiar maybe not with the entire plant but at least in the general departments and so forth that are close to where you're working?

A Yes.

Q 92 There's many types of different production jobs at Toyota, aren't there?

A Yes.

Q 93 Now by virtue of the restrictions that you had, you couldn't do production jobs that required repetitive use of your hands or arms, vibrating tools, and some lifting limitations; is that correct, in 1993?

A Yes.

Q 94 So I guess essentially these restrictions prevented you from doing certain range of fast-paced repetitive motion work? Would that be safe to say?

A I'm not sure on that.

Q 95 Could you do most of the jobs that you were familiar with at Toyota at that point?

A No.

Q 96 Could you do jobs that didn't involve production line work, repetitive motion work?

A Yes.

Q 97 So you couldn't do the jobs that involved repetitive motion work where you were constantly using your hands, though, could you, in 1993?

A No.

Q 98 And could you think of any other class of jobs out there at Toyota that you couldn't do back in 1993,

based on those restrictions?

A I can't remember.

Q 99 So the only one that you can think of right now, then, would be the repetitive motion type where you're going to be using your hands constantly?

A Yes.

Q 100 And as I understand it, and I've been out there too, not all jobs are repetitive motion at Toyota; correct?

A Yes.

Q 101 Again staying with the 1993 return to work, the group you returned to—and I know this is sometimes confusing to me. As I understand it, group leaders, team leaders, team members oftentimes refer to jobs out there by different names than, I guess, they're officially called, so kind of bear with me a little bit. I'm going to ask you about—I guess the official name for the group that you returned to was body paint inspection operations?

A Yes.

Q 102 And you, I guess, refer to that, and probably everybody else out there refers to that, as QCIO body paint and paint inspection?

A Yes.

Q 103 They're one and the same, then?

A Yes.

Q 104 And as I understand it, there are four processes in that group; is that correct?

A Yes.

Q 105 And I'm going to go through the processes with you real quickly here, and again, I'm going to use their official name and then ask you if you know it by another name; okay?

A (Witness nods head affirmatively.) Yes.

Q 106 And the first process would be assembly paint. I think you refer to that as assembly?

A Yes.

Q 107 The second process would be paint second inspection, and I think you refer to that as paint inspection?

A Yes.

Q 108 The third would be shell body audit, and I think you refer to that as body shop inspection?

A Yes.

Q 109 And the fourth would be ED surface repair, and I think they refer to that as ED inspection?

A Yes.

Q 110 And those would be the four areas and four processes within the group that you returned to?

A Yes.

Q 111 And now these are all processes that

regularly go on out there; correct?

A Yes.

Q 112 Somebody somewhere is always doing one of them? It's not like you shut it down and you're not doing ED repair on Mondays, Tuesdays, and Wednesdays; right?

A That's correct.

Q 113 So there's a team member doing one of these processes every time that they're up and running?

A Yes.

Q 114 Now are you familiar with the concept of job rotation at Toyota?

A Yes.

Q 115 Could you explain a little bit for me what your understanding of job rotation is?

A Job rotation is learning and knowing the different jobs in the group, left upon the group leader or assistant manager's discretion to how many jobs in that group the team member is trained to do.

Q 116 Now you explained, I guess, the training aspect of it, but the actual rotation, doesn't Toyota try to rotate people on jobs at varying intervals of time so you don't have to do the same thing, for example, all day or all week or all month?

A Not always.

Q 117 But at least when you were there, was that

one of the goals, though, to be able to move people around so that they wouldn't have to do the same thing all the time?

A It originated that way.

Q 118 Now when you went to work in 1993—and I'm just going to refer to it as the group from now on; okay—what process were you assigned to?

A Second inspection, body paint inspection operation.

Q 119 Paint second inspection, or I guess we can call it paint inspection?

A That's correct.

Q 120 And what did that job involve?

A Visually inspecting the paint of the car.

Q 121 Is the car coming down a conveyor?

A Yes.

Q 122 Did you have to stand over it and look at it?

A You stand beside the car.

Q 123 From what distance?

A Eighteen inches.

Q 124 Do you have any sort of jewelers cloth or anything like that where you're checking anything to see if there's abnormalities in the paint finish?

A You wear white gloves on your hands.

Q 125 And then you rub—

A And you also wear a blue paint suit.

Q 126 And with the white gloves, do you touch the surface?

A Yes.

Q 127 How often do you have to do that?

A That is—customarily it's in the standardized work, each car.

Q 128 Each car is done?

A Yes.

Q 129 Now when you did that, did you have to make a circular motion—

A No.

Q 130 —sort of like you're checking for dust?

A No. You're not checking for dust.

Q 131 She's not going to be able to pick this up, but could you explain the motion with your hand for me?

A Back and forth.

Q 132 Back and forth?

A Yes.

Q 133 And how long did you have to train on this paint inspection job?

A I don't know.

Q 134 Now would you use both hands, or you wore a white glove on only one hand?

A Both. You wear white gloves on both.

Q 135 And you would go across the car, back and forth, with both the right hand and the left hand?

A I rotated arms.

Q 136 So the answer would be yes, then, you would do both?

A Yes.

Q 137 You've got a whole car coming across at this point?

A No.

Q 138 What actually is coming in front of you?

A You do half.

Q 139 Half of the entire shell?

A Yeah, it's just like you've cut the car in half.

Q 140 So somebody else is responsible for the other side?

A Supposedly, yes.

Q 141 Now where do you stand when you do this? I know you're standing next to the car. Are you beneath the car?

A No.

Q 142 Are you floor level with it?

A No.

Q 143 Where are you?

A They have an area built up to where you're

* * * * *

[Pages 24-25 omitted]

towards you?

A It comes down a conveyor. You are on a ramp.

Q 162 Did you have any problems doing that job?

A No.

Q 163 Now you were also eventually trained on the assembly paint process?

A Yes.

Q 164 Do you recall when that was?

A No.

Q 165 But you were completely trained?

A Yes.

Q 166 Able to do that process?

A Yes.

Q 167 What did that process involve?

A Assembly inspection. You checked for mutilation of the car.

Q 168 What's mutilation?

A Scratches, dents, chips, anything that may occur during the assembly process.

Q 169 Was this totally a visual inspection, or did you have to touch the car?

A At one time—it's changed. At one time you opened the doors and checked inside the doors. It's more visual after they rewrote standardized work.

Q 170 When was that; do you remember?

A No, I don't.

Q 171 So at one time you had to open up the doors. Was that the only actual physical contact that you had with the car was opening the door?

A Shutting the hood or shutting the deck lid, whichever side of the car you were on.

Q 172 The deck for us laypeople is the trunk?

A Trunk.

Q 173 And about how often would a car come by when you were doing this inspection?

A Every 54 seconds, and I don't know what the tach time they're on right now.

Q 174 But when you were on assembly, every 54 seconds you'd have to open a door, check, close a door, open a trunk or open a hood, depending upon which side?

A Yeah, whatever way. It don't run—assembly, to hold them to a 54-second tach time is pretty impossible because of problems throughout assembly. The line stops and starts a lot.

Q 175 Now these are Camrys back then; right?

A Yes.

Q 176 I'm not familiar with a Camry hood. Is it an automatic pop? I mean, do you just hit a button and the whole thing comes up?

A. No. The car comes to us with the hood

raised.

Q 177 Already raised?

A Yeah, just a few inches.

Q 178 So you have to lift it up, then?

A No. You close it.

Q 179 You don't have to lift up and check under it?

A You're not responsible for checking under the hood.

Q 180 And the doors are standard doors? You pull on them, or do you push in on the—

A You open them with your hand.

Q 181 Pull out?

A You're grasping.

Q 182 Grasp out?

A Uh-huh. (Affirmative)

Q 183 And those are the movements you would be doing when you're on assembly?

A Yes.

Q 184 And when it's running at optimal time, you'd be doing each of those—

A Yes.

Q 185 —every 54 seconds?

A Like I said, the time frame varies, but yes.

Q 186 So I guess up to conservatively 40 to 50 times an hour?

A Yes.

Q 187 Did you have to do any overhead work on the assembly process?

A No.

Q 188 Everything came to you at either, what, shoulder level or waist level?

A Shoulder level, below shoulder level.

Q 189 So you never had to raise your arms above your shoulders, then?

A No.

Q 190 Not even when you were closing the trunk, or did the trunk come the same way, opened just slightly?

A The trunk has a jig or whatever that's holding it. I don't know what they're called. They're not required to be called a jig in assembly. It has something holding it that you pull down.

Q 191 You had to hold onto it, then, obviously?

A You or your fellow team member, whichever, however it is, you close the trunk.

Q 192 And just so I understand, both of you—there's two people on each car. There's supposed to be, anyway?

A Yes.

Q 193 Both of you have to open doors, obviously, and I guess on four-door cars, you're going to open two

doors apiece?

A Till standardized work was changed, yes.

Q 194 And either you or the other team member is going to have the trunk, and the other one would have the hood?

A Yes.

Q 195 I don't know how the plant is set up with respect to the lines, but were you working on two-door cars or four-door cars or both?

A Most generally four-door.

Q 196 So in that 54 seconds, that tach time, you were opening two doors, closing two doors, and either doing a trunk or hood; is that right?

A Yes.

Q 197 Now you talked a couple of times about standardized work changing. What was the change in standardized work?

A We didn't deal with closing or opening the hoods. We also didn't check inside the doors.

Q 198 What did you do then? Was it just purely visual?

A It was outside body of the shell, shell body, outside shell body of the car.

Q 199 And that is just a visual inspection, or did you have to rub with gloves?

A That's visual inspection pretty much is what it is.

Q 200 No touching of the car?

A If you find something that you need to put your hands on and touch, such as a scratch, or if you question something that may be sitting on top of the paint, you touch.

Q 201 Now when you said standardized work changed, and I know it's kind of hard to remember dates and all, but do you recall about how long before you stopped working at Toyota, which would have been the end of 1996, the first part of 1997, do you remember how far or how long before that standardized work had changed?

A No.

Q 202 Do you recall if it was in 1996 anytime?

A Nō.

Q 203 Can you recall if it was in 1995 at anytime?

A I'm not sure.

Q 204 So it would do me no good to say '94, then?

A I'm not sure when they changed it.

Q 205 I understand. Were you able to do this assembly process, though?

A As long as I was on a weekly rotation.

Q 206 And that's both before and after the standardized work changed?

A Yes.

Q 207 How long did you train on that; do you recall?

A No.

Q 208 Now you mentioned weekly rotation. At that point you were rotating between paint inspection and assembly?

A Yes.

Q 209 And you did that, I guess, for a couple of years?

A Yes.

Q 210 Now you weren't the only team member in the group; right?

A That's correct.

Q 211 I guess there were, what, seven other team members besides yourself?

A I don't remember how many exactly.

Q 212 You had two team leaders? Do you recall that?

A Most of the time.

Q 213 And at least one group leader?

A Yes.

Q 214 Now were you ever told that Toyota wanted everyone, including you, to eventually be able to rotate through three processes?

* * * * *

COMMONWEALTH OF KENTUCKY
DEPARTMENT OF WORKERS' CLAIMS
NO. 97-01035

ELLA F. WILLIAMS

Plaintiff,

-

v.

TOYOTA MOTOR MANUFACTURING, KENTUCKY, INC. AND SPECIAL FUND

Defendants.

DEPOSITION

DEPONENT:	ELLA F. WILLIAMS
DATE:	FRIDAY, JUNE 27, 1997
TIME:	9:00 A.M.
PLACE:	LAW OFFICES OF ROSENBAUM & ROSENBAUM SUITE 300 201 WEST SHORT STREET LEXINGTON, KENTUCKY

Q 206. Do you have any problems walking?

A No, sir, not really. My hip bothers me from time to time. But no, sir, I do not.

Q 207. Okay. How about your other basic functions, breathing and things like that, your basic—

A I have no problem with my breathing or any basics, other than the shoulders and my neck.

Q 208. Okay. Is your vision okay?

A Yes, sir, twenty/twenty.

Q 209. Hearing okay?

A To my knowledge, yes, sir.

Q 210. Okay. Personal hygiene, taking care of yourself, dressing yourself, are you able to do that?

A I—personal hygiene, yes, sir. Dressing, I get some help occasionally with my dressing. Raising my arms and sometimes getting dressed, I can't reach my arms like I need to anymore. I kinda get stiffened up sometimes, and I get some help there.

Q 211. Okay. Brush your teeth, for example?

A I do that, no problem.

Q 212. Okay. Wash your face?

A Yes, sir.

Q 213. And bathe yourself okay?

A Yes, sir.

Q 214. Okay. As far as your day-to-day activities, what kinds of things do you do during the day? How do you spend your time?

A I stay home. Flexeril, the Flexeril makes you drowsy, and I try to avoid any driving due to driving causes me pain. And Flexeril is a drug that slows your response to doing things.

Q 215. What do you—

A So at home, I try to keep—I have my children at home. And my husband does my soil for me, and I like flower gardening, reading. I don't do a—I stay home just pretty much. And my son plays baseball and stuff like that, and I just—my kids.

Q 216. Okay. Take me through an average day-to-day routine. You get up at what time, approximately?

A Well, I don't have an average day, so—my husband went back to nights. So the kids are out of school. So we've all pretty much—we've tried to go over to his time frame somewhat.

Q 217. What time do you usually get up in the morning?

A Some days it's seven, and some days I don't get

up till ten. It's whatever the kids—how my night's been asleep.

Q 218. Okay. And what do you usually do when you get up in the morning?

A When I get up in the morning, I fix breakfast. We'll have breakfast, and we'll talk, and everything's talked over what's gotta be done that day and that night. I do—I do my laundry from time to time, ever how—whatever how that works out, your laundry, your—the boys were given the job of—they take care of my dishwashing. And chores, things that need to be done around the house, just normal everyday things.

Q 219. Okay. Dusting and things like that?

A I don't dust.

Q 220. Well, describe—when you say normal day-to-day things around the house, I need—

A Normal things is pick up, a little more organization. I try to keep it organized. My kids help me a lot. They help a lot. They know mom's had a lot of trouble with her shoulders and her arms over the years, so they help a lot.

Q 221. Okay. Has that improved? Doing things around the house, has any of that improved? You said

your pain has lessened some. Have you gotten—

A Yes, sir.

Q 222. Okay. What areas have you seen improvement in around the house?

A I—as far as picking up and keeping the house organized and taken care of. Back when I first went out in December, there for several weeks, months, everything hurts. And if I do anything at all, it causes—my neck locks up. Sitting for a long period of time and not moving and stirring, it hurts. So, I mean, as far as around the house and getting out in the yard and the kids, I was driving and—driving still bothers me a lot. I'm lucky the fact that the ball field's within a mile of my house. But I frequent—in doing just taking care of—

Q 223. Normal, some of your normal everyday activity—

A Yeah.

Q 224. —You've seen improvement?

A Yeah.

Q 225. Okay. As far as your driving, are you able to drive?

A I drive—like I said, I do drive, but I keep it down to a very minimum. I can—for instance, my son got his two front permanent teeth knocked out. And I can drive and bring him to Lexington to the dentist. But by the time I get there, my neck muscles, I'm feeling the nerves tingling in my shoulder, and my neck tightens up, and I get into quite a bit of pain. And by the time I get back home, I'm ready for some pills and some alcohol.

Q 226. Were you able to drive yourself over today for the deposition?

A No, sir. My husband brought me.

Q 227. Okay. You live in Cynthiana?

A Just outside the city limits.

Q 228. Okay, and how far was that from the Georgetown plant, approximately?

A Something like thirteen, fifteen miles, something like that.

Q 229. Okay. As far as your general area where you have worked, has that generally been around the Lexington/Cynthiana area as far as the kind—where you've worked in the past?

A The only place I've ever worked since living in this area is Toyota.

* * * * *

EASTERN KENTUCKY COUNSELING AND REHABILITATION SERVICES

WILLIAM J. WEIKEL, Ph.D.
DIPLOMATE, AMERICAN BOARD OF VOCATIONAL EXPERTS
CERTIFIED MENTAL HEALTH COUNSELOR
NATIONAL CERTIFIED COUNSELOR

Vocational Report

Ella "Freda" Williams is a 38 year old female, born 4/28/59, who was seen on 12/5/97 at the request of her attorney, Leslie Rosenbaum, for the purpose of providing a vocational report. Prior to meeting with Ms. Williams, I was provided with various medical reports.

Dr. Kleinert (5/4/92) suggested that Ms. Williams avoid overhead work, constant repetitive use of the hands and arms for flexion or extension and vibratory tools. On 11/21/96, he released Ms. Williams to return to alternative duty as of 11/22/96, with restrictions to light work, to avoid constant/repetitive static use of the hands, vibratory tools and overhead work. Previously, Ms. Williams had a bilateral carpal tunnel release that Dr. Dimar (12/17/96) said had "resolved completely." He noted a minor disc bulge at C5-6 and C6-7 and probable bursitis of the rotator cuff with bilateral tenderness, right greater than the left. The MRI reports of 12/27/96 of the right shoulder show extensive peritendinitis inflammation. Dr. Smith (2/19/97) noted parascapular symptoms, myofascial pain and rotator cuff tendinitis. On 7/2/97, he restricted Ms. Williams from repetitive work, production work and lifting above shoulder level. Later additions (7/15/97) were for no light industry/assembly line work and no significant use of the arms for repetitive tasks.

Ms. Williams drove to my Morehead office noting an increase in neck and right shoulder pain. She usually averages about 20 miles of driving per week.

Ms. Williams completed the tenth grade. She earned a GED and has about two and one-half years of college work at Western Kentucky University.

On the Wide Range Achievement Test, R-2, Ms. Williams scored at the beginning of the ninth grade level (13th percentile) for reading and at the beginning of the tenth grade level (37th percentile) for arithmetic.

Ms. Williams notes a gradual onset of symptoms. She last worked about 12/6/96 and has not worked since that date.

Ms. Williams ranks her current problems as:

1. Right shoulder pain that began about the fall of 1996. She gets trigger point injections from Dr. Smith and wears a vest-like garment that fastens up the front, plus a "sports" bra. She has attended physical therapy, but recently stopped due to her son's medical problems. She takes Flexeril, Prosac, and Vistaril and uses heat and ice packs on the shoulder.

2. Neck pain.

3. Nervous problems with depression, crying spells and short temper. She reports that she wants to stay at home and has had some suicidal thoughts. She goes to counseling with Dr. Martha Wetter and also sees Dr. Scott Lance and takes the medication noted above.

4. Sleep problems improved with Vistaril so she now averages about six hours.

5. IBS. This started about 1995, but has improved with treatment at the Mayo Clinic.

6. Ms. Williams notes that her carpal tunnel was resolved with successful surgery and treatment, although she still has permanent restrictions related to this condition.

Ms. Williams denies the use of tobacco products. She notes some prior problems with alcohol, but states that she has not had a drink in two months.

Ms. Williams estimates that she can sit without problem; stand without problem; walk with occasional problems due to occasional hip pain; and lift only eight pounds. She can bend and stoop without problem.

Ms. Williams lives with her husband of 11 years. She has a grown daughter (age 19) and children ages 13, 10 and 8 still at home. She does some housework with help from the children, but does not move furniture. She vacuums with pain and "seldom" dusts. Ms. Williams avoids sweeping, but does cook, make beds and do laundry. She has quit dancing and most gardening, but tends her flowers. She occasionally attends church, but used to go twice a week. Ms. Williams plays less with the children.

For the purpose of this report, sedentary work is defined as lifting ten pounds maximum and occasionally lifting and/or carrying articles such as dockets, ledgers and small tools. Although a sedentary job primarily involves sitting, a certain amount of walking and standing is often necessary in carrying out job duties. Sedentary work frequently involves sitting about six hours in an eight hour day.

Light work involves lifting of 20 pounds maximum with frequent lifting and/or carrying of objects weighing up to ten pounds. Even though the weight lifted may be a negligible amount, a job is in this category when it requires walking or standing to a significant degree, or sitting most of the time with a degree of pushing or pulling of arm and/or leg controls.

Medium work is Lifting 50 pounds maximum and/or carrying of objects weighing up to 25 pounds.

Heavy work is lifting 100 pounds maximum with frequent lifting or carrying of up to 50 pounds and very heavy work is lifting objects in excess of 100 pounds or carrying of objects of 50 pounds or more.

Unskilled work can be learned in any time from a short demonstration up to and including 30 days. Semi-skilled work requires from one to six months of training. Skilled work takes from six months to several years to lean.

Ms. Williams' work history follows:

8/13/90 - 12/6/96 Toyota. From about 1990 to 12/93, Ms. Williams was a team member in the paint shop. She did mostly light, unskilled jobs preparing cars to be painted, putting on masking tape, applying primer and some computer keyboarding. She also did some inspecting in the paint shop. Next, she was moved to a power train assembly job using pneumatic tools. She developed carpal tunnel on this assembly job which was treated by Dr. Kleinert. Next, from 12/93 to 10/96, she was moved to an inspector and assembly/body paint inspector. As an inspector, she visually inspected paint jobs. Ms. Williams stood all day in this light job and did some bending, stooping and crouching. They would measure and mark defects and return them on the line. They rotated sides of the car. In the latter job, she inspected the finished car including bumpers, mirrors, paint, etc. She reports that she did okay on these jobs. Next, from 10/96 on, she was moved to the body shop where about every other week she rotated to a pre-paint, raw metal job where she wet a sponge with highlight oil and wiped down a side of a car and inspected it for flaws. She had problems doing this job. It was light and semiskilled. At Toyota, she was earning about $700.00 per week.

Prior to 1990—Ms. Williams worked on and off in 1986-1987 as a light, unskilled sales clerk for Sears and as a light, unskilled binder for Brown's Print Company (1985-1986). She was a housewife and mother from the 1970's to about 1985. She worked as a sedentary, unskilled seamstress at a sewing factory in the early 1970's.

If I assume that Dr. Kleinert is correct, Ms. Williams has a loss of access to the labor market of about 50% to 55%, which is significantly more than she had in 1992.

Dr. Smith's restrictions are similar, but I do not believe that he has yet released Ms. Williams to return to work.

It seems to me that after Ms. Williams was successfully treated for carpal tunnel, she returned to work at a job she could do and performed that job for almost three years. When she was moved to a new job, a job that required repetitive motion, problems developed with the shoulder and neck. My opinion is that she could return to the paint inspection job at Toyota (as she did from 12/93 to 10/96) if these jobs were available to her.

Ms. Williams has lost the ability to perform heavier jobs and also those light and sedentary jobs calling for repetitive use of the upper extremities and/or overhead work.

If Ms. Williams is unable to return to her customary work at Toyota, I would expect a significant loss of wages throughout her lifetime.

/s/ 12/12/97

William J. Weikel, Ph.D. Date

DICTATED BY DR. WEIKEL

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON DIVISION
CASE NO.: 97135

ELLA F. WILLIAMS

Plaintiff.

v.

TOYOTA MOTOR MANUFACTURING, KENTUCKY, INC.

Defendant.

The deposition of DR. DAVID PRICE was taken on behalf of the Plaintiff, before Cindy J. Shakley, a Court Reporter and Notary Public in and for the State of Kentucky at Large, at the Toyota Motor Manufacturing Plant located at 1001 Cherry Blossom Way in Georgetown, Kentucky on Thursday, November 6, 1997 at the hour of 9:40 a.m. Said deposition was taken both stenographically and by videotaping means for all purposes as permitted by the Federal Rules of Civil Procedure.

CINDY J. SHAKLEY—Professional Reporter
3405 Samford Court
Lexington, Kentucky 40515
Phone—(606) 272-3129
Fax—(606) 245-5255

restriction being written. You come down the page, it's either work-related or not work-related, I checked work-related in this instance. Restrictions are listed under that and they're either temporary or indefinite, and I've checked temporary. And it applies to all work or certain hours of work, in this instance I checked all work. And then I came down under "Comments" and wrote out three restrictions or three descriptive restrictions for the group leader to follow.

Q And will you tell me what those were.

A Well, number one and not related to this visit, but I wrote these down since they were permanent restrictions of four years standing, those permanent restrictions said, "No overhead work, no vibratory tools, constant/repetitive use both hands/arms as in flexion/extension of the elbows and wrists. And 20 pound lifting and 10 pound carrying." Which meant that she was not to lift more than 10 pounds or to have a sustained carrying activity of more than 10 pounds.

Q Okay. And then you've got "Current restrictions."

A Those are the restrictions that

were written for her neck and shoulders, primarily.

Q Okay.

A And they say, "No above chest level, extended reach, or repetitive rotary or lateral movements of the head/neck."

* * * * *

[46]

[Exhibit # 2]

LOUISVILLE HAND SURGERY

One Medical Center Plaza, Suite 700
225 Abraham Flexner Way
Louisville, Kentucky 40202
(502) 561-4263, 1-800-477-4263
Fax Number (502) 561-4288

Patient: Ella Williams

Return to work: As Available

Work Restrictions

(If suitable work is not available, patient should remain off work until next office visit.)

☐ Sedentary work: Lifting 10 pounds maximum and occasionally lifting or carrying articles up to 5 pounds

☒ Light work: Lifting 20 pounds maximum with frequent lifting or carrying objects weighing up to 10 pounds

☐ Medium work: Lifting up to 50 pounds maximum with frequent lifting or carrying objects up to 25 pounds

Avoid constant repetitive use of both hand(s) and arm(s)

_____ pushing/pulling

_____ pinching/gripping

__X__ flexion/extension of wrist/elbow

☒ No overhead work (keep hands below heart level)

☒ No use of vibratory (pneumatic) tools

☐ No climbing (avoid unprotected heights)

☐ Strictly one-handed work (keep injured hand clean and dry)

☐ Primary one-handed work with injured hand assisting on light tasks

☐ Avoid exposure to marked temperature changes (extremes of hot and cold)

Duration of work restrictions permanent

Comments

/s/ M.D.

James M. Kleinert

5/4/92 Date

AUG 31 2001

No. 00-1089

Supreme Court, U.S.
FILED
AUG 31 2001
OFFICE OF THE CLERK

In The

Supreme Court of the United States

TOYOTA MOTOR MANUFACTURING, KENTUCKY, INC.,

Petitioner,

v.

ELLA WILLIAMS,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF FOR RESPONDENT

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CASES:

Ackerman v. Western Elec. Co., 643 F.Supp. 836 (N.D. Cal. 1986) 37

Bailey v. Tisch, 689 F.Supp. 652 (S.D. Ohio 1988) 37

Baltimore & Philadelphia Steamboat Comp. P.S.B. Co. v. Norton, 284 U.S. 404 (1932) 30

Bentivegna v. United States Dep't of Labor, 694 F.2d 619 (9th Cir. 1982) 37

Bento v. I.T.O. Corp. of R.I., 599 F.Supp. 731 (D.R.I. 1984) 36

Bey v. Bolger, 540 F.Supp. 910 (E.D. Pa. 1982) 36

Bowen v. American Hosp. Ass'n, 476 U.S. 610 (1986) 38

Bragdon v. Abbott, 524 U.S. 624 (1998) ..... *passim*

Cleveland v. Policy Management Systems Corp., 526 U.S. 795 (1999) 30

Coley v. Secretary of Army, 689 F.Supp. 519 (D. Md. 1987) 37

Colin K. v. Schmidt, 715 F.2d 1 (1st Cir. 1983) 37

Dancy v. Kline, 639 F.Supp. 1076 (N.D. Ill. 1986) 37

Daubert v. United States Postal Service, 733 F.2d 1367 (10th Cir. 1984) 37

Davis v. Bucher, 451 F.Supp. 791 (E.D. Pa. 1978) 36

Doe v. N.Y. Univ., 666 F.2d 761 (2d Cir. 1981) 36

Doe v. Region 13 Mental Health-Mental Retardation Comm'n, 704 F.2d 1402 (5th Cir. 1983) 37

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Doherty v. Southern College of Optometry, 659 F.Supp. 662 (W.D. Tenn. 1987) 36

Fitzgerald v. Green Valley Area Educ. Agency, 589 F.Supp. 1130 (S.D. Iowa 1984) 36

Forrisi v. Bowden, 794 F.2d 931 (4th Cir. 1986) 39, 43

Fynes v. Weinberger, 677 F.Supp. 315 (E.D. Pa. 1985) 38

Gardner v. Morris, 752 F.2d 1271 (8th Cir. 1985) 36

Guinn v. Bolger, 598 F.Supp. 196 (D.D.C. 1984) 36

Holly v. City of Naperville, 603 F.Supp. 220 (N.D. Ill. 1985) 36

Johnson v. DeGrandy, 512 U.S. 997 (1994) 22

Kampmeier v. Nyquist, 553 F.2d 296 (2d Cir. 1977) 37

King v. St. Vincent's Hosp., 502 U.S. 215 (1991) 26

Kiphart v. Saturn Corp., 251 F.3d 573 (6th Cir. 2001) 14

Kling v. County of L.A., 633 F.2d 876 (9th Cir. 1980) 38

Longoria v. Harris, 554 F.Supp. 102 (S.D. Tex. 1982) 36

Lorillard v. Pons, 434 U.S. 575 (1978) 35

Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986) 25, 42

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McKay v. Toyota Motor Mfg. U.S.A., Inc. 110 F.3d 369 (6th Cir. 1997) 11, 16, 17, 42, 43

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STATEMENT OF THE CASE

FACTUAL BACKGROUND

This case arises out of Ella Williams' second lawsuit against Toyota Motor Manufacturing, Kentucky, Inc. ("Toyota") for violations of the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. §§ 12101 *et seq.*, and this case seeks to compel Toyota to continue reasonable accommodations which Ms. Williams won as a result of the first ADA lawsuit.

Ella Williams is 42 years of age and is married with children. (JA 37, DCD 16 p. 6).[1] She is five feet tall. (DCD 17, Depo. p. 24). She reads at the ninth grade level, and her mathematical skills are at the tenth grade level. (JA 38).

Her vocational background is in production work and factory work. (DCD 16, Depo. p. 43).

She was employed by Toyota in 1990 in the paint department. Later, she was transferred to the power train group, an assembly line job where she built car engines

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[1] References to the record are made by abbreviations noting the place where the document may be found and perhaps describing the document in abbreviated form; e.g., deposition is Depo. and memorandum is Memo. The Joint Appendix will be referred to by the letters "JA," materials before the District Court will be identified by the District Court docket number, "DCD," materials before the Sixth Circuit Court of Appeals will be identified by the Circuit Court docket number, "CCD," materials appearing in the appendix to the Petition for Writ of Certiorari shall be referred to as "Pet. App.," and matters appearing in Petitioner's Brief on the Merits will be indicated by "Pet. Brief."

using pneumatic tools. (DCD 103, Memo. p. 2). After working with pneumatic tools, she developed painful symptoms in her hands, wrists, and arms and sought treatment from Toyota's in-house medical provider, Industrial Health Services ("IHS"), where she was diagnosed as suffering from carpal tunnel syndrome. (DCD 103, Memo. p. 3). She treated with Dr. James Kleinert of Louisville Hand Surgery who, in May, 1992, permanently restricted Ms. Williams' activity as follows:

1. Light work lifting no more than 20 pounds and frequently lifting or carrying of objects weighing up to 10 pounds,

2. No constant repetitive use of both hands and arms and no flexion or extension of the wrists or elbows.[2]

3. No overhead work and keep hands below heart level, and

4. No use of vibratory or pneumatic tools.

(JA 45-46).

Ms. Williams' work-related injury caused her to file a claim against Toyota under the Kentucky Workers' Compensation Act, Ky. Rev. Stat. 342.0011 *et seq.*, which was settled on the basis of 20% occupational impairment. (DCD 103, Memo. p. 4).

[2] Flexion is the act of bending, and extension is movement bringing members of a limb into or toward a straight condition. "Dorland's Illustrated Medical Dictionary," 24th Edition, 1965.

Additionally, in 1993, Ms. Williams filed suit against Toyota under the ADA[3] on the ground that Toyota had not furnished reasonable accommodation in assigning Ms. Williams to work which she could perform. That suit was settled, and as part of the settlement, Ms. Williams returned to work at Toyota in December, 1993. (DCD 103, Memo. p. 4).

When she returned, Ms. Williams was placed in the body paint inspection group. (DCD 43, Depo. p. 17). Persons with disabilities or medical restrictions were in this group. (DCD 17, Depo. pp. 34-35). Ms. Williams was a medical placement in the group. She was characterized as such on a tracking list which Toyota maintained for the following reason:

> Well, inspection had a history of receiving people that for one reason or another could not use either their hands or wrists or shoulders and things of that nature, and it got to be a problem because we was losing so many people. So we started tracking people for their effectiveness, was this a medically placed team member or not.

(DCD 151, Hall Depo. pp. 8-9).

In Ms. Williams' new group at Toyota, there were four jobs which were as follows:

1. Assembly paint inspection,
2. Paint second inspection,
3. Shell body audit, and
4. E.D. surface repair.

(DCD 17, Depo. p. 19).

[3] Future references to Title I of the ADA will be made by only stating the Section number.

Ms. Williams was placed on a team in the paint shop which only did assembly paint inspection and paint second inspection. (DCD 35, Depo. 23). The assembly paint inspection job was primarily a visual job in which she checked paint for scratches, dents, chips, etc. There was some physical contact with the car. (JA, pp. 24-25). The paint second inspection job involved visually inspecting the paint of the car. She did wear white gloves and would touch the surface of the vehicle if she believed there was an abnormality in the paint finish. (JA pp. 21-22).

Toyota physician David Price described Ms. Williams' jobs as follows:

> The inspection jobs in this plant are the easiest jobs that we give anyone, they require the least physical activity and are basically jobs that are not repetitive in nature. They involve maybe using an observation to look at something or maybe running your hand over a surface to feel for a defect. But they're not a constant or repetitive type of job requirement.

(DCD 24, Depo. p. 47).

The other two jobs in her group, shell body audit and E.D. surface repair, were in the body shop. (DCD 151, Depo. p. 11). Ms. Williams was placed in the team doing the paint shop jobs, assembly paint and paint second inspection, because they were the easier jobs. (DCD 151, Depo. pp. 11-13).

The two other jobs out of the body shop were repetitive manual activity jobs. Toyota assistant manager Kendall Hall stated,

Q. OK. On the team that was doing the two jobs which were shell body and E.D. out of the body shop, did either of those jobs require repetitive movements of the upper extremities?

A. Yes sir.

Q. And which job was that?

A. Well, the shell body job did a lot of hand motions, and you actually wiped the vehicle down with some type of a highlight oil.

Q. OK.

A. I don't know the name of the oil.

Q. What about E.D., was that a job that required repetitive use of the upper extremities?

A. Yes, sir, you actually did some rubbing on the car, some minor repairs, if you got good at it, and you did a lot with the luggage, around the edge of the luggage, things of that nature. So both jobs were repetitive.

Q. Were the jobs over in the body shop more demanding in terms of repetitive activity than the jobs in the paint shop?

A. The paint shop – the paint team was the easier team.

Q. OK, and was that because of repetitive movement of the upper extremities or because of something else?

A. That it was a factor.

(DCD 151, Hall Depo. pp. 12-13).

Upon her return in 1993, Ms. Williams was able to perform her work to the level of an average team member. (DCD 151, Depo. p. 13).

In the fall of 1996, after she had been successfully employed at Toyota for almost three years, Ms. Williams was asked if she would cross-train on the shell body audit job,[4] and she agreed to do so. (DCD 103, Memo, p. 5). Shell body is an inspection for defects in the metal auto body of the automobile. (DCD 35, Depo. pp. 28-30). Ms. Williams was required to soak a sponge in the highlight oil and wipe down part of the shell body of a car. (DCD 16, Depo. p. 8). A part of 450 to 500 car shell bodies had to be wiped down, and the allotted job time was about 58 seconds for each shell body. (DCD 46, Depo. pp. 21-23; DCD 44, Depo. pp. 60-61). The shell body job was more physically demanding than the paint jobs she had been performing, and it caused her to experience pain. (DCD 16, Depo. pp. 9-12). She sought care from Toyota's doctors at IHS, and they diagnosed her as suffering from the following:

1. Myotendonitis bilateral periscapular, an inflamation of the muscles and tendons around both of her shoulder blades,

2. Myotendonitis,

3. Myositis bilateral forearms with nerve compression causing media nerve irritation, and

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[4] Toyota mistakenly identifies the job which Ms. Williams could not do as the E.D. surface repair job, Pet. Brief p. 5, when in fact it was the shell body job. Ms. Williams never attempted to perform the E.D. surface repair job.

4. Thoracic outlet compression which is a condition causing pain in the nerves leading to the upper extremities.

(DCD 103, Memo. p. 6).

She was seen by Toyota's IHS doctor David Price who diagnosed her as suffering from pan myositis which is a general irritation of the trapezius, biceps, and triceps muscles. (DCD 24, Depo. pp. 9-10). He stated her neck, shoulder, and upper extremity discomfort was related to her employment. (DCD 24, Depo. p. 67). He noted her permanent restrictions from Dr. Kleinert and added restrictions to those. The additional restrictions were, "no above chest level, extended reach, or repetitive rotary or lateral movements of the head/neck." (JA 45-46).

Ms. Williams also sought care from Dr. Mark Smith, a board-certified orthopedic surgeon, who diagnosed Ms. Williams as suffering from myofacial pain caused by her work. He restricted her activity and testified she should not be wiping highlight oil on from 450 to 500 auto shell bodies per shift because this would significantly aggravate her condition. There were objective signs of injury which were knotting and spasms of the muscles which he treated by trigger point injections. There was also an MRI showing peritendinitis of the muscles surrounding the shoulder joint. (DCD 103, Memo. pp 9-10, Ex. E).

After Ms. Williams experienced difficulties with the shell body job, a Toyota representative viewed the job in connection with Ms. Williams' medical restrictions and concluded that her restrictions should not preclude her from doing the job, "Because under the Department of Labor standards constant repetitive is greater than 67% of

the work and you do not use your arms in greater than 67% of the work in that shell body process." (DCD 45, Mills Depo. p. 116). The job was not analyzed while Ms. Williams was doing the job. (DCD 45, Mills Depo. p. 45). Therefore, the Toyota representative could not have understood that the hood of the shell body was above Ms. Williams' chest level and the top of the car came to her above eye level which would require her to work on the hood and the deck at or above shoulder level. (DCD 16, Depo. pp. 13-15). This is a violation of the restrictions prohibiting work above heart level. The Toyota representative also did not understand that the medical application of the restrictions, especially the word *constant*, requires a common sense interpretation and not a technical definition such as 66% of the time. Toyota doctor David Price testified the restrictions have to be written in everyday language and using common sense, so that the non-medical people that have to interpret them will be able to do so. He also testified the ultimate question is whether a team member can perform a job within the restrictions. (DCD 24, Depo. pp. 22-23).

William J. Weikel, Ph.D., diplomate, American Board of Vocational Experts, gave testimony that the permanent restrictions from Dr. Kleinert caused Ms. Williams to suffer a lack of access to the labor market of from 50% to 55% and that she could return to the paint inspection job at Toyota, as she did from December, 1993 to October, 1996, if the job were still available to her. (JA 41). Dr. Weikel's evidence is directed to the economy of central Kentucky where Ms. Williams lives. (DCD 157, Depo. pp. 39-40). He states if she cannot return to her customary

work at Toyota, "I would expect a significant loss of wages throughout her lifetime." (JA 41).

In addition to the vocational ramifications of her injury and consequent medical restrictions, all Ms. Williams' life activity is affected. She needs occasional help with dressing because "I can't reach my arms like I need to anymore." Gardening is limited, housework is limited, and driving an automobile is curtailed. When she left Toyota in December, 1996, for a period of months, "Everything hurts. And if I do anything at all, it causes – my neck locks up. Sitting for a long period of time and not moving and stirring, it hurts." (JA 38-41).

The evidence is uncontradicted concerning Ms. Williams' medical diagnoses and medical restrictions as is the expert vocational testimony from Dr. Weikel.

Ms. Williams could not do the shell body job. (DCD 17, Depo. p. 97). Toyota informed Ms. Williams that she would have to do the shell body job or be fired. Ms. Williams attempted to comply with the demand, and in doing so she was injured further and could not continue working. When Ms. Williams could not work, Toyota fired her under the guise that she had voluntarily resigned her employment by not coming to work. (DCD 103, Memo. p. 12).

JUDICIAL PROCEEDINGS BELOW

On April 18, 1997, Ms. Williams brought suit against Toyota in the United States District Court for the Eastern

District of Kentucky alleging that she is a qualified individual with a disability and that Toyota has discriminated against her by failing to reasonably accommodate her disability. A trial by jury was demanded. (DCD 1).

After discovery, the case was submitted to the District Court on cross-motions for summary judgment (DCD 103, 99), and the Court overruled Ms. Williams' motion for summary judgment and granted Toyota's motion for summary judgment (DCD 158, Memorandum and Order).

The District Court ruling is muddled because the District Court did not understand the movant for summary judgment has the initial burden to demonstrate why a summary judgment is in order. Instead, the District Court believed that when a motion for summary judgment is made, the non-movant is required to prove a prima facie case without regard to whether the movant claimed that an essential element of the non-movant's case was lacking. "Accordingly, in order to withstand Defendant's motion for summary judgment, Plaintiff must utilize the *McDonnell Douglas*[5] framework, and is charged with the task of coming forth with her prima facie case." (Pet. App. 30a). This led to criticisms by the District Court that Ms. Williams failed to present any evidence regarding the nature and severity of her impairment, the duration of it or the long-term impact which are considerations mentioned in 29 C.F.R. § 1630.2(j)(2). (Pet. App. 36a). Toyota never urged this as a ground for granting summary judgment and could not have in light of Dr. Kleinert's restrictions which were permanent, as

[5] 411 U.S. 792 (1973)

well as the medical testimony and diagnoses of Toyota's physicians and others. Likewise, the District Court strongly criticized Ms. Williams because in connection with the activity of working, she did not identify her access to the job market *"in her own geographical area."* (Pet. App. 40a, emphasis in original). Again, Toyota never raised this point because it was aware that Dr. Weikel had directed his testimony to the job market in Ms. Williams' geographical area. (DCD 157, Depo. pp. 39-40).

However, the District Court did state other reasons why Ms. Williams could not be disabled in the major life activities of performing manual tasks and working. As concerns manual tasks, the District Court stated that Ms. Williams' references to manual limitations "are irretrievably contradicted by Plaintiff's continual insistence that she could perform the tasks in assembly and paint inspection without difficulty; positions requiring manual tasks." (Pet. App. 36a). The lack of logic in this statement is apparent. The fact that Ms. Williams can do isolated, non-repetitive manual activity does not allow the inference that she has no substantial limitations regarding repetitive manual activity that the average person in the population can perform.

As concerns the major life activity of working,[6] the District Court relied heavily on the Sixth Circuit case of *McKay v. Toyota Motor Mfg. U.S.A., Inc.*, 110 F.3d 369 (6th Cir. 1997) in which it was held that an individual with restrictions similar to those of Ms. Williams was not ADA

[6] The District Court also ruled Ms. Williams was not disabled in the major life activity of lifting because it was felt her limitations were not substantial enough. (Pet. App. 37a).

disabled because the restrictions only related to a narrow range of assembly line manufacturing jobs.

The District Court also believed that since Ms. Williams had not done medium duty work previously, she could not be a qualified individual with a disability as concerns medium work. (Pet. App. 42a). In fact, Dr. Weikel considered Ms. Williams to be capable of doing medium level work prior to injury because he knows of nothing to prevent her from doing that. (DCD 157, Depo. pp. 19-21). There is no evidence suggesting she could not do medium work prior to her injury.

Ms. Williams also contended before the District Court that she was ADA disabled because under § 12102(2)(B), she has a record of an impairment that substantially limits a major life activity and under § 12102(2)(C), she is regarded as an individual having an impairment that substantially limits a major life activity. The District Court rejected these contentions. (Pet. App. 43a-47a).

On appeal to the Sixth Circuit, Ms. Williams argued the District Court erred in granting summary judgment to Toyota on the issue of whether Ms. Williams was substantially limited in the major life activity of performing manual tasks. She argued the District Court erred in finding no substantial limitation concerning manual tasks only because Ms. Williams could perform the easy jobs of assembly paint and paint second inspection which involved little manual activity. (CCD, 6/16/99, Brief, p. 20).

The Sixth Circuit agreed. The panel noted the ADA prohibits discrimination against "a qualified individual with a disability" and especially noted, "The phrase

'qualified individual with a disability' is defined as a person 'with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.' § 12111(8)." (Pet. App. 3a).

Further, the panel specifically noted and emphasized that in order to constitute an ADA disability because of a physical or mental impairment, the impairment must be one which *"substantially limits one or more of the major life activities."* (Pet. App. 3a, emphasis in original).

Ms. Williams' impairments were regarded as substantial when the panel said, "Her ailments are analogous to having missing, damaged or deformed limbs . . . ", but the panel then linked this statement to various manual jobs "that required the gripping of tools and repetitive work with hands and arms extended at or above shoulder level for extended periods of time." (Pet. App. 4a).

Ms. Williams does not believe the foregoing language was intended to mean she was only disabled as concerns jobs requiring gripping of tools and repetitive work at or above shoulder level. The panel makes this clear when it later says, "Here, the impairments of limbs are sufficiently severe to be like deformed limbs and such activities affect manual tasks associated with working, as well as manual tasks associated with recreation, household chores and living generally." (Pet. App. 6a).

Having already correctly stated that an ADA disability requires a substantial limitation of a major life activity, the panel then goes on to add another requirement to the analysis of an ADA disability, and that additional

requirement is, "[T]he plaintiff must show that her manual disability involves a 'class' of manual activities affecting the ability to perform tasks at work." (Pet. App. 4a).

This additional requirement that in order to prove an ADA disability it is necessary not only to prove a substantial limitation in a major life activity, but it is also required that the substantially limited major life activity affect the ability to perform tasks at work is a subject neither briefed nor argued by the parties before the Sixth Circuit.

Ms. Williams will not support or argue for a definition of disability which requires not only that the claimant must be substantially limited in a major life activity, but additionally, that the substantial limitation must also affect the ability to work.[7]

However, regardless of whether the Sixth Circuit enunciated the correct analysis to determine whether an ADA disability exists, it is incorrect to maintain the Sixth Circuit has held an ADA disability exists without a showing that the impairment substantially limits a major life activity and exists only because the impairment incidentally "affects" work.

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[7] In Respondent's Brief in Opposition to the Petition, p. 9, it is suggested that the panel's requirement that the impairment "affect" employment was simply an acknowledgment that § 12112(a) prohibits discrimination in employment. However, with the rendition of *Kiphart v. Saturn Corp.*, 251 F.3d 573 (6th Cir. 2001), Respondent understands that the "affect" work requirement is part of Sixth Circuit precedent applying the requirement to the determination of whether a disability exists. Respondent does not support this interpretation.

Toyota mistakenly says the Sixth Circuit held as a matter of law that "Williams' inability to perform the particular manual tasks associated with her specific job, without more, demonstrates that she is 'substantially limit[ed]' in the major life activity of performing manual tasks." (Pet. Brief, pp. 11-12 with similar assertions at Pet. Brief, pp. 1, 10, 15, 18-19 n. 6).

Although the opinion below may lack clarity in some respects, there is no finding of disability simply because Ms. Williams was only unable to perform the shell body audit job.

Toyota has misstated the holding of the Sixth Circuit in another respect.

Toyota asserts, "According to the panel, it was irrelevant that Williams remained perfectly capable of accomplishing any number of manual tasks outside the narrow subset of assembly-line duties that gave her difficulty." (Pet. Brief p. 8, citing to Pet. App. 4a).

This is incorrect. The correct statement of the panel is, "The fact that Williams can perform a range of isolated, non-repetitive manual tasks performed over a short period of time, such as tending to her personal hygiene or carrying out personal or household chores, does not [a]ffect a determination that her impairment substantially limits her ability to perform the range of manual tasks associated with an assembly line job." (Pet. App. 4a).

The Sixth Circuit opinion has a dissent by Judge Boggs who would affirm the District Court. He says,

> Williams has not shown a substantial limitation in working, because the inability to perform a

> single, particular job is not a substantial limitation, and she has not demonstrated that there is a broader class of jobs from which her impairment disqualifies her. Nor has Williams shown a substantial limitation in performing manual tasks, because her limitation is mostly confined to a subset of job-specific tasks.

(Pet. App. 11a).

There is no support in this record for Judge Boggs' conclusion. No one testifies Ms. Williams' restrictions only prevent her from performing the shell body job. Rather, the evidence is that she is unable to perform any job requiring repetitive manual activity or the lifting of more than 10 pounds on a regular basis. No witness suggests that performing repetitive manual labor is "a single, particular job." The assertion that Williams has not demonstrated disqualification from a broader class of jobs is incorrect and is conclusively contradicted by Dr. Weikel who states Ms. Williams has lost access of from 50% to 55% of the labor market. (JA 41). Likewise, the assertion that Ms. Williams' limitation "is mostly confined to a subset of job-specific tasks," is without factual support and ignores the broad range and class of work which is beyond her capability as well as the pervasive effect her limitations have in her everyday life.

The likely basis for Judge Boggs' statements is the case of *McKay v. Toyota Motor, Mfg., U.S.A., Inc.*, 110 F.3d 369 (6th Cir. 1997) which erroneously holds that as concerns the major life activity of working, an inability to perform repetitive manual activity coupled with an inability to lift more than 10 pounds on a frequent basis

only disqualifies an individual from performing "[A] narrow range of assembly line manufacturing jobs." *Id.* at 373.

It is true Ms. Williams cannot perform the shell body job. Her limitations also prevent her from performing many jobs. There are approximately 16,000,000 manufacturing jobs in the nation, and approximately 290,000 of these jobs are in Kentucky.[8] A 50% loss of access would translate into a loss of 8,000,000 manufacturing jobs nationwide, and a loss of 145,000 jobs in Kentucky.

Having reached the conclusion that Ms. Williams was ADA disabled as concerns the major life activity of performing manual tasks, the Sixth Circuit declined to address whether she was substantially limited as to the major life activities of lifting or working (Pet. App. 5a), and it also declined to address whether Ms. Williams made a sufficient showing to be entitled to trial on the issues of whether she was disabled because she had a record of being disabled, § 12102(2)(B), or that she was disabled because she was regarded as having a disabling impairment, § 12102(2)(C). (Pet. App. 6a).

Toyota, being dissatisfied with the Sixth Circuit opinion, filed a Petition for Rehearing En Banc, and Ms. Williams filed a Petition for Rehearing. Toyota's Petition questioned the disability analysis. (CCD, 7/21/00). Ms. Williams' Petition requested the panel to rule on her

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[8] U.S. Census Bureau, County Business Patterns 1999, United States at p. 23 and Kentucky at p. 10, Washington, D.C. 2000, http://www.census.gov/prod/www/abs/cbptotal.html

claims that the District Court erroneously granted summary judgment on her alternate theories of disability. (CCD, 7/24/00).

The panel issued an Amended Opinion. (Pet. App. 1a-11a). There were significant changes.

The original opinion stated, "Although we have concluded that there is a triable issue of fact as to whether Williams was disabled and as to whether the defendant auto manufacturer failed to reasonably accommodate her disability,. . . . " (Pet. App. 17a). The amended opinion stated, "Although we have concluded that Williams is disabled and that there is a triable issue of fact as to whether the defendant auto manufacturer failed to reasonably accommodate her disability,. . . . " (Pet. App. 6a).

The original opinion stated, "Because we conclude that a trial on the merits is necessary on Williams's ADA claim, . . . " (Pet. App. 16a). The amended opinion stated, "Because we conclude that Williams is substantially limited in performing manual tasks, we do not need. . . . " (Pet. App. 5a).

The Court then remanded the case only on the issue of whether Toyota reasonably accommodated the disability. In other words, the Sixth Circuit held as a matter of law that Ms. Williams was ADA disabled.

SUMMARY OF THE ARGUMENT

The Question Presented masks the issues present in this case because it is settled law that the inability to perform one type of job, a specialized job, or a particular

job of choice is not a substantial limitation in the major life activity of working. *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 492 (1999). As concerns working, disability exists only when the individual is significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes. 29 C.F.R. § 1630.2(j)(3)(i).

The Question Presented is premised on several propositions which are disputed and which are as follows.

Toyota asserts that because Ms. Williams can perform many manual tasks, both at home and work, it is error to find a manual disability. (Pet. Brief, p. 3). Toyota says a manual impairment must impose "severe restrictions" and "impose a *considerable* restriction on" using "one's hands to meet the basic demands of life" before the manual impairment could rise to the level of an ADA disability (Pet. Brief, p. 13, emphasis in original). Even though the Sixth Circuit expressly declined to consider whether Ms. Williams was disabled as concerns working, (Pet. App. 5a), Toyota says the Sixth Circuit violated the rule, heretofore only applied to working, that an inability to do a particular job prevents the finding of a manual disability. (Pet. Brief, p. 19). Finally, Toyota warns that unless its propositions and arguments are accepted, beneficent Congressional intentions to aid the disabled will be thwarted because a "vast number" of employees with minor impairments will seek costly and unreasonable accommodations. This will so strap the financial resources of employers that they will be unable to accommodate the needs of the "truly disabled." (Pet. Brief, pp. 29-30).

Toyota arguments are without factual support, violate traditional rules of statutory construction; and rest upon a disability analysis which has been expressly rejected.

When the Question Presented rests upon assumed facts and premises, it is appropriate to address those facts and premises even if they are not explicit in the question. *Bragdon v. Abbott*, 524 U.S. 624, 648 (1998).

I.

Ms. Williams is disabled because she is substantially limited in the major life activity of performing manual tasks. There is no issue of fact concerning her medical restrictions on repetitive manual activity and being limited to lifting no more than ten pounds regularly and no more than twenty pounds occasionally. Her impairment affects, "[M]anual tasks associated with recreation, household chores, and living generally." (Pet. App. 6a). The absence of a factual dispute entitles her to judgment as a matter of law.

II.

Toyota's tunnel vision concentration on the meaning of disability does damage to the central purpose of the Act which is to prohibit discrimination against qualified individuals with a disability; that is, people who are able to work. The meaning of *disability* can only be determined by viewing it in the context of the Act as a whole. To adopt Toyota's harsh view of *disability* is to limit the application of the ADA to only a few because many of those who meet Toyota's disability definition will not be

entitled to protection because they will be so impaired they cannot work. The ADA only protects those able to work.

Limiting the application of the Act by employing a "rigorous threshold" (Pet. Brief, p. 10) to being ADA disabled frustrates the remedial purpose of the Act by increasing the standard to where the individual would be so disabled, he could not work. Although the purpose of keeping the disabled at work is properly limited by the rule that reasonable accommodation not be an "undue hardship," the facts are that accommodation could be had without any cost in the instant case by allowing the same accommodations previously allowed, and that accommodation in general is inexpensive.

The concept that Ms. Williams is not manually disabled because she is capable of performing many manual tasks at home and at work is irrelevant. Cases decided under the Rehabilitation Act of 1973, 29 U.S.C. §§ 701, *et seq.*, which are authoritative here, hold that to be eligible for relief, the person must be "otherwise qualified," meaning the disabled individual may possess many abilities that qualify him for various activities, including work.

III.

Alternatively, the record gives rise to genuine issues of material fact concerning whether Ms. Williams is disabled. Repetitive factory work is not a narrow range of jobs too small to warrant ADA protection. A jury trial is required on all issues. Ms. Williams does not abandon her claim that she is disabled as concerns working or lifting,

nor does she abandon her claims that she is disabled because she has a record of being disabled and is regarded as being disabled.

ARGUMENT

I.

THE SIXTH CIRCUIT CORRECTLY HELD THAT MS. WILLIAMS WAS DISABLED AS A MATTER OF LAW AS CONCERNS PERFORMING MANUAL TASKS.

The Sixth Circuit properly adjudged Ms. Williams to be disabled as a matter of law even if the language of the opinion is incorrect. "[T]his Court 'reviews judgments, not statements in opinions,'. . . . " *Johnson v. DeGrandy*, 512 U.S. 997, 1003 (1994) (citations omitted).

To establish a *disability* under the ADA, respondent is required to show that she has an "impairment" that "substantially limits one or more of [her] major life activities." § 12102(2)(A).

The method of determining whether an ADA disability exists is stated in *Bragdon v. Abbott*, 524 U.S. 624, 631 (1998).

First, consideration is given to whether Ms. Williams' physical conditions; myotendonitis, etc.; constitute a physical impairment. There is no dispute here because Toyota agrees that her physical conditions constitute ADA impairments. (Pet. Brief, p. 11).

Second, consideration is given to whether Ms. Williams identifies a "major life activity." Ms. Williams identifies the major life activity as performing manual tasks.

Again, there does not appear to be controversy over whether "performing manual tasks" constitutes a "major life activity." The Equal Employment Opportunity Commission regulations implementing Title I of the ADA, which at the very least " '[C]onstitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance,' " *Bragdon*, 524 U.S. at 624 (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 139-140 (1944)) identify performing manual tasks as a major life activity. Additionally, Toyota recognizes that performing manual tasks is a major life activity as per 29 C.F.R. § 1630.2(h)(2)(i). (Pet. Brief, p. 11).

Third, the inquiry becomes, "[W]hether the impairment substantially limited the major life activity." *Bragdon*, 524 U.S. at 631. This inquiry involves consideration of the facts and of applicable regulations.

The facts concerning Ms. Williams' restrictions are not questioned by Toyota. In summary, she cannot lift more than 20 pounds, she cannot lift more than 10 pounds on a regular basis, and she cannot engage in repetitive manual activity.

The regulation, 29 C.F.R. § 1630.2(j)(1-2), states what is necessary in order to be substantially limited. This requirement is met when the employee is "[S]ignificantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general society can perform that same major life activity." § 1630.2(j)(1)(ii).

There is no attempt by Toyota to suggest that the "average person in the general population" is unable to lift more than 20 pounds and unable to lift more than 10 pounds on a regular basis. There is no suggestion that the "average person" is unable to engage in repetitive manual activity. The Sixth Circuit aptly stated the nature and severity of Ms. Williams' impairment when it said, "Here, the impairments of limbs are sufficiently severe to be like deformed limbs and such activities affect manual tasks associated with working, as well as manual tasks associated with recreation, household chores and living generally." (Pet. App. 6a).

Additionally, the regulation states three factors to be considered in determining what is a substantial limitation in a major life activity. They are:

"(i) the nature and severity of the impairment;

(ii) the duration or expected duration of the impairment; and

(iii) the permanent or long-term impact, or the expected permanent or long-term impact of or resulting from the impairment."

§ 1630.2(j)(2).

The nature and severity of her impairments are documented by the medical diagnoses.

As for duration of her impairments, the evidence is clear that her restrictions are permanent.

The permanent or long-term impact resulting from her impairment is that she is never going to be able to lift more than 10 pounds on a regular basis. She is never

going to be able to lift more than 20 pounds and will only be able to lift 20 pounds occasionally. She will never be able to engage in repetitive manual activity.

Ms. Williams submits that the Sixth Circuit finding of an ADA disability is appropriate because, "[T]he record taken as a whole could not lead a rational trier of fact to find for" Toyota. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 474 U.S. 574, 587 (1986).

Ms. Williams suggests it is significant that *Bragdon v. Abbott, supra,* is a case where Ms. Abbott was found to be ADA disabled as a matter of law by all three courts which considered the question, and this Court held a 20% risk of transmitting AIDS to a sexual partner along with an 8% risk of transmitting AIDS to a newborn child constitutes " . . . [A] substantial limitation on reproduction." *Bragdon*, 524 U.S. at 639-640.

Likewise, the uncontradicted report or Dr. Weikel, and the published statistical data suggest that Ms. Williams is disqualified from millions of manufacturing jobs as a result of her impaired ability to perform manual tasks.

The Sixth Circuit's judgment that Ms. Williams was ADA disabled is correct and should be affirmed.

II.

TOYOTA'S INTERPRETATION OF *DISABILITY* IS OUT OF CONTEXT, DENIES THE REMEDIAL PURPOSE OF THE ACT AND RELIES ON A DISABILITY ANALYSIS PREVIOUSLY REJECTED.

A.

THE MEANING OF *DISABILITY* IS DETERMINED BY CONSIDERATION OF THE ACT AS A WHOLE.

Not only must the statutory provisions defining *disability* be considered, but it also is necessary to consider the context in which the term appears in the Act as a whole in order to know what the term means.

The case of *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991) states,

> In so concluding we do nothing more, of course, than follow the cardinal rule that a statute is to be read as a whole, see *Massachusetts v. Morash*, 490 U.S. 107, 115, 109 S.Ct. 1668, 1673, 104 L.Ed.2d 98 (1989), since the meaning of statutory language, plain or not, depends on context. See, *e.g. Shell Oil Co. v. Iowa Dept. of Revenue*, 488 U.S. 19, 26, 109 S.Ct. 278, 282, 102 L.Ed.2d 186 (1988). "Words are not pebbles in alien juxtaposition; they have only a communal existence; and not only does the meaning of each interpenetrate the other, but all in their aggregate take their purport from the setting in which they are used. . . . " *NLRB v. Federbush Co.*, 121 F.2d 954, 957 (CA2 1941) (L. Hand, J.) (quoted in *Shell Oil, supra*, 488 U.S. at 25, n.6, 109 S.Ct. at 281, n.6).

Statutory terms are to be given their ordinary, contemporary, common meaning unless Congress intended differently. *Williams v. Taylor*, 529 U.S. 420, 431 (2000).

Here *disability* must be construed in context because a simple dictionary definition will not adequately explain the role of *disability* in the ADA. For example, disability can be understood to mean an "inability to do something," or the "inability to pursue an occupation or perform services for wages because of physical or mental impairment."[9]

It is certain that *disability* does not mean *inability* because § 12102(2)(A) states *disability* is an "impairment that substantially limits . . . ," not *prohibits* a major life activity. *Bragdon v. Abbott*, 524 U.S. 624, 641 (1998) states, "The Act addresses substantial limitations on major life activities, not utter inabilities."

Further, § 12102(2) states that disability be determined, "[W]ith respect to an individual . . . ," and this implies that Ms. Williams' limited education and work experience should be taken into account. *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 483 (1999) says, "[W]hether a person has a disability under the ADA is an individualized inquiry."

It is notable in the instant case that neither Toyota nor its *amici* make any comment upon the role that *disability* plays in the administration of the ADA. Instead, attention is focused upon the meaning of *disability* in isolation to other provisions of the ADA, and a construction of

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[9] Webster's Third New International Dictionary of the English Language Unabridged 642 (1966).

disability is urged which only can be termed harsh and draconian.

Toyota urges a "rigorous threshold for coverage" under the ADA and claims the "impairment must be one that imposes severe restrictions." (Pet. Brief, pp. 10, 12). In particular, Toyota claims that in order for one to be substantially disabled in the major life activity of performing manual tasks, there must be *considerable* restriction on being able to use one's hands to meet "the basic demands of life." (Pet. Brief, p. 13).

The goal of such extreme interpretations of *disability* would appear to be candidly stated in the *amicus* brief of American Trucking Associations, Inc., *et al.*, at page 10, where it is stated, "Defining 'disability' properly also is critically important in keeping the lid on ADA litigation."

These extreme interpretations are not justified and should be rejected when the concept of *disability* is considered within the context of the ADA as a whole.

The operative provision of Title I of the ADA, 42 U.S.C. §§ 12111-12117, is § 12112(a) which states,

> No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

Importantly, the ADA, Title I, does not prohibit discrimination against all disabled individuals. Disability discrimination is prohibited only against "a qualified individual with a disability." Section 12111(a) informs,

> The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.

The point of the foregoing recitation is to show that in order for an individual to be entitled to ADA relief, that individual must be able to carry out the essential functions of employment. Put another way, if an individual is so disabled that he cannot work, then he is not entitled to relief under the ADA regardless of the discriminatory practices used against him.

It is beyond cavil that the ADA protects individuals capable of regular employment, but if the term *disability* is interpreted in such a harsh manner so as to allow only those whose restrictions are so severe as to prevent them from working to be considered *disabled*, then the operative provision of the ADA, § 12112(a), is thwarted.

The ever present tension in the ADA is between the concepts of *disability* and of a *qualified individual with a disability*. The seeming paradox of the ADA is that it protects individuals who are *disabled*, but only if they are able to perform the essential functions of the employment; that is, only if they can work.

> An ADA plaintiff bears the burden of proving that she is a "qualified individual with a disability" – that is, a person "who, with or without reasonable accommodation, can perform the essential functions" of her job. 42 U.S.C. § 12111(8).

Cleveland v. Policy Management Systems Corp., 526 U.S. 795 at 806 (1999).

The ADA protects disabled people who can work.

B.

THE MEANING OF *DISABILITY* UNDER THE ADA SHOULD BE CONSTRUED SO AS TO FURTHER AND EFFECTUATE THE REMEDIAL PURPOSE OF THE ACT.

It is axiomatic that statutes should be construed liberally in order to effectuate their remedial purposes. *Potomac Electric Power Co. v. Director, OWCP*, 449 U.S. 268 at 281 (1980); *Reed v. Steamship Yaka*, 373 U.S. 410 at 415 (1963); *Voris v. Eikel*, 346 U.S. 328 at 333 (1953); and *Baltimore & Philadelphia Steamboat Comp. P.S.B. Co. v. Norton*, 284 U.S. 404 at 414 (1932).

In *Cleveland v. Policy Management Systems Corp.*, 526 U.S. 795 at 801 (1999) this Court declares the purpose of the ADA to be as follows:

> The ADA seeks to eliminate unwarranted discrimination against disabled individuals in order both to guarantee those individuals equal opportunity and to provide the Nation with the benefit of their consequently increased productivity.

Ms. Williams suggests the foregoing means the purpose of the ADA is to guarantee equal employment opportunity to disabled individuals who can work. This has the salutary purpose of increasing the employees' economic welfare as well as the economic welfare of the Nation. The ADA prevents employers from taking

adverse job actions against employees who can work, such as Ms. Williams who was working. The mental or physical impairments must substantially limit one or more major life activities, but the limitations cannot be so great as to prevent the employee from performing the "essential functions of the employment position." § 12111(a).

Of course, there are individuals who have catastrophic disabilities but can still work. There can be no question about their disabilities, and no question that the ADA protects and applies to them. Yet, this does not mean that one must be catastrophically disabled in order to be entitled to ADA protection.

It being the purpose of the ADA to keep people at work, and it being the scope of the ADA to protect only those who can work, the ADA should be construed so as to protect those who have substantially limiting impairments which do not prohibit working.

Although it is claimed that such a so-called "relaxed" standard of *disability* will defeat the Act's purpose to help the "truly disabled" individuals because of the high cost of reasonable accommodation, there is absolutely no evidence in this record that would support such a view. Indeed, reasonable accommodation in the instant case would have been totally without cost to Toyota because the reasonable accommodation was simply to allow Ms. Williams to return to the productive job which she had performed for almost three years prior to Toyota's discrimination.

Leaving the instant case aside for a moment, the information which does exist concerning the cost of reasonable accommodation shows that the cost of accommodation is minimal and the cost of not accommodating the disabled is substantial.

In formulating and considering the provisions of the ADA before its passage, Congress received testimony from numerous individuals concerning the cost of reasonable accommodation. Attention was given to the cost of reasonable accommodation under the Federal Rehabilitation Act of 1973 because of the identical statutory provisions concerning reasonable accommodation in the Rehabilitation Act.

Jay Rochlin, Executive Director of the President's Committee on Employment of People with Disabilities, testified that a 1982 study showed that a majority of accommodations provided by the Federal Contractors involved little or no cost. Testimony before the House Subcommittees on Select Education and Employment Opportunities, September 13, 1989, No. 1 101-51, p. 35. According to the President's Committee which operates the Job Accommodation Network, some typical accommodations include:

> A timer with an indicator light which allowed a medical technician who was deaf to perform the laboratory tests required for her job;
>
> A light probe which allowed a receptionist who was visually impaired to determine which lines on the telephone were ringing, on hold, or in use at her company;

> A headset for a phone which allowed an insurance salesperson with cerebal palsy to write while talking.

Witnesses also explained that there will be a need for more expensive accommodations as well, including readers for blind persons, interpreters for deaf persons, and physical accommodations for those with mobility impairments. But even costs for these accommodations are frequently exaggerated. Evan Kemp, Commissioner of the Equal Employment Opportunity Commission, explained to the Committee:

> Sears and Roebuck made their whole national headquarters accessible for $7,600.00 with TTY's, ramps, this and that and the other thing. It is hard to believe that they could do it for that cheap a price. But if a person wants disabled people, the accommodations really don't become a burden. If they don't they always do. (Testimony before House Subcommittees on Capital Select Education and Employment Opportunities, September 13, 1989, No. 101-51, p. 20).

A witness, Justin Dart, Jr. stated:

> As a former CEO of both large and small enterprises, employing persons with severe disabilities and constructing accessible facilities, I know that ADA is affordable for business and that ADA is good business and this is not simply my personal opinion. Every significant requirement of ADA is now being implemented successfully by progressive public and private entities somewhere. (Testimony before House Subcommittees on Capital Select Education and

> Employment Opportunities, Ser. No. 101-37, July 8, 1989, p. 57).

Not only is the cost of accommodation minimal, the societal cost of not reasonably accommodating the disabled is great. Congress specifically has found the continuing existence of unfair discrimination "[C]osts the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity." 42 U.S.C. § 12101(a)(9).

The term *disability* should be construed so as to increase the number of economically productive persons in our society even though they have substantially limiting impairments which do not impair their ability to work. Employers are protected from unreasonable accommodation costs if the accommodation constitutes an "undue hardship." § 12111(10) and § 12112(b)(5)(A).

C.

DISABILITY SHOULD BE CONSTRUED IN A MANNER CONSONANT WITH THE INTERPRETATION GIVEN TO THE SAME TERM BY THE FEDERAL REHABILITATION ACT OF 1973.

Disability is a word with a history. The statutory language defining disability is practically identical with the definition of "handicapped individual" in the Rehabilitation Act of 1973, currently found at 29 U.S.C. § 705(9), and the definition of "handicapped" contained in the Fair Housing Amendments Act of 1988, 42 U.S.C. § 3602(h)(1). *Bragdon v. Abbott, Id.* at U.S. 631.

Moreover, the ADA itself in § 12201(a) provides that nothing in the ADA shall be construed to apply a lesser

standard than the standards applied under the Rehabilitation Act of 1973.—

This Court has found the statutory direction in the ADA, § 12201(a), to mean,

> The directive requires us to construe the ADA to grant at least as much protection as provided by the regulations implementing the Rehabilitation Act.

Bragdon v. Abbott, at U.S. 632.

Reference to the Rehabilitation Act of 1973 also is appropriate because when Congress adopted language of the Rehabilitation Act into the ADA, this suggests that Congress intended those provisions to be interpreted in the same way they had been interpreted under the Rehabilitation Act.

> So too, where, as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute.

Lorillard v. Pons, 434 U.S. 575, 581 (1978).

An examination of decisions under the Rehabilitation Act is helpful in arriving at a proper construction of *disability* in three ways.

First, even though the question of what constituted a disability under the Rehabilitation Act was not often addressed, the Courts adjudicating Rehabilitation Act claims routinely adopted an expansive view of what

constitutes a disability and found disability to include epilepsy,[10] cardiovascular disease,[11] former drug use,[12] psychiatric problems,[13] legal blindness,[14] manic depressive syndrome,[15] ankylosing spondylitis,[16] nervous and heart conditions,[17] multiple sclerosis,[18] blindness in one eye,[19] heart condition,[20] osteoarthritis of the knee joints,[21] cerebal palsy and dyslexia,[22] leg amputation,[23] unusual sensitivity to tobacco smoke,[24] retinitis pigmentosa,[25]

[10] *Fitzgerald v. Green Valley Area Educ. Agency*, 589 F.Supp. 1130, 1135-36 (S.D. Iowa 1984).

[11] *Bey v. Bolger*, 540 F.Supp. 910, 916 (E.D. Pa. 1982).

[12] *Davis v. Bucher*, 451 F.Supp. 791, 796 (E.D. Pa. 1978).

[13] *Doe v. N.Y. Univ.*, 666 F.2d 761, 765 (2d Cir. 1981).

[14] *Norcross v. Sneed*, 755 F.2d 113 (8th Cir. 1985).

[15] *Gardner v. Morris*, 752 F.2d 1271 (8th Cir. 1985).

[16] *Sisson v. Helms*, 751 F.2d 991 (9th Cir. 1985).

[17] *Treadwell v. Alexander*, 707 F.2d 473 (11th Cir. 1983).

[18] *Pushkin v. Regents of University of Colorado*, 658 F.2d 1372 (10th Cir. 1981).

[19] *Holly v. City of Naperville*, 603 F.Supp. 220, 229 (N.D. Ill. 1985).

[20] *Bento v. I.T.O. Corp. of R.I.*, 599 F.Supp. 731, 741 (D.R.I. 1984).

[21] *Guinn v. Bolger*, 598 F.Supp. 196 (D.D.C. 1984).

[22] *Fitzgerald v. Green Valley Area Educ. Agency*, 589 F.Supp. 1130, 1135-36 (S.D. Iowa 1984).

[23] *Longoria v. Harris*, 554 F.Supp. 102, 103 (S.D. Tex. 1982).

[24] *Vickers v. Veterans Admin.*, 549 F.Supp. 85, 86-87 (W.D. Wash. 1982).

[25] *Doherty v. Southern College of Optometry*, 659 F.Supp. 662 (W.D. Tenn. 1987).

vision in only one eye,[26] impaired hearing and use of hearing aids,[27] depressive neuroses,[28] congenital limb deficiency,[29] degenerative spinal condition,[30] chronic lower back syndrome with disc disease,[31] limited mobility of arm and shoulder,[32] osteoarthritis in hip,[33] artificial leg,[34] learning disabilities,[35] diabetes,[36] heart disease,[37] asthma,[38] absence of kidney,[39] hepatis B

[26] *Kampmeier v. Nyquist*, 553 F.2d 296 (2d Cir. 1977).

[27] *Strathie v. Dep't. of Transp.*, 547 F.Supp. 1367 (E.D. Pa. 1982).

[28] *Doe v. Region 13 Mental Health-Mental Retardation Comm'n*, 704 F.2d 1402 (5th Cir. 1983).

[29] *Wolff v. South Colonie Cent. School Dist.*, 534 F.Supp. 758 (N.D. N.Y. 1982).

[30] *Daubert v. United States Postal Service*, 733 F.2d 1367 (10th Cir. 1984).

[31] *Dancy v. Kline*, 639 F.Supp. 1076 (N.D. Ill. 1986).

[32] *Prewitt v. United States Postal Service*, 662 F.2d 292 (5th Cir. 1981).

[33] *Coley v. Secretary of Army*, 689 F.Supp. 519 (D. Md. 1987).

[34] *Ward v. Mass. Bay Transp. Auth.*, 550 F.Supp. 1310 (D. Mass. 1982).

[35] *Colin K. v. Schmidt*, 715 F.2d 1 (1st Cir. 1983).

[36] *Bentivegna v. United States Dep't of Labor*, 694 F.2d 619 (9th Cir. 1982).

[37] *Bailey v. Tisch*, 689 F.Supp. 652 (S.D. Ohio 1988).

[38] *Ackerman v. Western Elec. Co.*, 643 F.Supp. 836 (N.D. Cal. 1986).

[39] *Poole v. South Plainfield Bd. of Educ.*, 490 F.Supp. 948 (D.N.J. 1980).

carrier,[40] narcolepsy,[41] birth defects,[42] asbestosis,[43] and Crohn's disease.[44] [45]

It is easily seen that the Rehabilitation Act has a broad scope and applied to disabilities with various degrees of severity. There was little controversy about exactly what constituted a disability. These facts argue against the more restrictive view of disability advanced by Toyota.

Second, just as the construction of the Rehabilitation Act found a broad range of maladies to constitute disabilities, the Rehabilitation Act also recognized that it was not the particular malady or impairment that was the focus of the disability determination, but, instead, it was the effect of the impairment on the individual.

> The definitional task (of determining who is a handicapped person) cannot be accomplished merely through abstract lists and categories of impairments. The inquiry is, of necessity, an individualized one – whether the particular

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[40] *New York State Ass'n for Retarded Children v. Carey*, 612 F.2d 644 (2d Cir. 1979).

[41] *Ross v. Beaumont Hosp.*, 687 F.Supp. 1115 (E.D. Mich. 1988).

[42] *Bowen v. American Hosp. Ass'n*, 476 U.S. 610 (1986).

[43] *Fynes v. Weinberger*, 677 F.Supp. 315 (E.D. Pa. 1985).

[44] *Kling v. County of L.A.*, 633 F.2d 876 (9th Cir. 1980).

[45] The foregoing list was gathered from "The Americans With Disabilities Act after *Sutton v. United Air Lines* – Can It Live Up To Its Promise of Freedom for Disabled Americans?", 89 KLJ 539 (2001) and "Disability Discrimination in Employment Law," 137-140 (1995), Robert L. Burgdof.

> impairment constitutes for the particular person a significant barrier to employment.

Forrisi v. Bowen, 794 F.2d 931 (4th Cir. 1986), parenthetical statement added.

Third and most importantly, it was widely understood, and this Court so held, that the reasoning employed by the District Court in the instant case, the same reasoning which Toyota seeks to uphold, has been rejected under the Rehabilitation Act.

The District Court determined Ms. Williams was not disabled concerning manual tasks because her claimed limitations "are irretrievably contradicted by Plaintiff's continual insistence that she could perform the tasks in assembly and paint inspection without difficulty; positions requiring manual tasks." (Pet. App. 36a). Toyota agrees. (Pet. Brief, p. 7).

The flaw in this reasoning is that it ignores the fact that in order for an individual to be entitled to protection under the Rehabilitation Act or the ADA, that individual must be "otherwise qualified" or a "qualified individual," meaning that the employee must be able to do the work. Hence, it is wrong to exclude someone from ADA protection simply because they are able to work or they retain functional abilities as concerns the life activity in question.

The point is made in *Southeastern Community College v. Davis*, 442 U.S. 397 (1979) which was this Court's first case dealing with the interpretation of the Rehabilitation Act of 1973.

In *Southeastern Community College v. Davis*, this Court noted that an individual must meet legitimate physical requirements in order to be an "otherwise qualified" individual. "An otherwise qualified person is one who is able to meet all of a program's requirements in spite of his handicap." *Id.* at U.S. 406.

> [A] person who suffers from a limiting physical or mental impairment still may possess other abilities that permit him to meet the requirements of various programs. Thus, it is clear that Congress included among the class of "handicapped" persons covered by § 504 a range of individuals who could be "otherwise qualified." See S.Rep. No. 93-1297, pp. 38-39 (1974), U.S. Code Cong. & Admin. News p. 6373.

Id. at U.S. 405.

An individual is not excluded from protection against disability discrimination simply because they have the ability to work and function. In *Reynolds v. Brock*, 815 F.2d 571 (9th Cir. 1987), the District Court held that a clerk typist who suffered from epilepsy was not a handicapped person because she could perform the physical tasks of her job. The Ninth Circuit reversed,

> The District Court's approach would preclude any "otherwise qualified individual" from being classified as handicapped, because, under its analysis, anyone who could meet all of a job's requirements, and therefore was "otherwise qualified," would not be handicapped. Reynolds is "otherwise qualified." She may also be handicapped. A plaintiff need not prove that she is incapable of doing her job to prove that she is handicapped.

Reynolds v. Brock, Id. at 573.

When Toyota urges this Court to affirm the ruling of the District Court, Toyota requests this Court to adopt the flawed reasoning that Ms. Williams cannot be disabled as concerns manual activity because the record clearly shows she can perform some manual activity. The error is such reasoning leads to the conclusion that in order for Ms. Williams to be disabled, she must be incapable of performing manual activity, but that result would make the ADA meaningless because if disability means inability, then there will not be any "otherwise qualified individuals" to benefit from the Act.

III.

ALTERNATIVELY, THE CASE SHOULD BE REMANDED FOR A JURY TRIAL AS TO WHETHER MS. WILLIAMS IS DISABLED FOR PERFORMING MANUAL TASKS, LIFTING, WORKING, HAVING A RECORD OF DISABILITY, OR BEING REGARDED AS DISABLED.

If Ms. Williams is not entitled to judgment as a matter of law that she is disabled, then she is entitled to have the matter determined by a jury as she demanded and as the law requires.[46] The trial would address not only performing manual tasks but also working, lifting, having a record of disability, and being regarded as disabled.

The recent case of *Reeves v. Sanderson*, 530 U.S. 133 (2000)[47] is instructive and reaffirms the role of the jury in

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[46] 42 U.S.C. § 1981a(c).

[47] Although the case addressed the amount and kind of evidence necessary to sustain a jury verdict as per Rule 50, this

resolving factual conflicts and the varying inferences to be drawn therefrom. This Court noted that the whole record is to be reviewed, and "In doing so, however, the Court must draw all reasonable inferences in favor of the non-moving party, and it may not make credibility determinations or weigh the evidence." *Id.* at 150.

The only circumstance in which Ms. Williams would not be entitled to a jury trial is, "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.' " *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

The same facts Ms. Williams relies on in support of her argument that she is entitled to judgment as a matter of law also support her entitlement to trial by jury.

Should the case be remanded for trial, it becomes necessary to address the Sixth Circuit precedent of *McKay v. Toyota Motor Mfg., U.S.A., Inc.*, 110 F.3d 369 (6th Cir. 1997) in which it was held as a matter of law that impairments similar to those of Ms. Williams did not give rise to an ADA disability for Ms. McKay because the impairments disqualified her "from only the narrow range of assembly line manufacturing jobs that require repetitive motion or frequent lifting of more than 10 pounds." *McKay, Id.* at 373.

Should this case be remanded for trial, this Court should make the following points:

Court noted that summary judgment standard "mirrors" the Rule 50 standard. *Reeves v. Sanderson, Id.* at U.S. 150.

1. Whether Ms. Williams is disabled requires consideration of the "individualized inquiry" requirement of *Sutton v. United Air Lines, Inc., Id.* at U.S. 483, which means the real question always is "[W]hether the particular impairment constitutes for the particular person a significant barrier to employment." *Forrisi v. Bowen, Id.* at 933. Her limited education and vocational experience cause her impairments to have a greater impact on her than on an individual with more skills. Ms. McKay was 24 years old, had a college degree, and was earning a teaching certificate. *McKay, Id.* at 371.

2. *McKay* is factually incorrect because manufacturing jobs requiring repetitive manual activity and frequently lifting of more than 10 pounds are not a narrow range of jobs.

3. The "narrow range of jobs" analysis has no relevance to Ms. Williams' claim that she is substantially limited in the major life activity of performing manual tasks because the "narrow range of jobs" analysis only pertains to the major life activity of working, not to the major life activity of performing manual tasks. *See* 29 C.F.R. § 1630.2(j)(3)(i).

If this case is remanded without a discussion of *McKay*, then the likelihood of another District Court error is great.

CONCLUSION

Ms. Williams respectfully requests this Court to affirm the Sixth Circuit decision that she is disabled as a

matter of law and remand the case to the District Court for further proceedings concerning whether Toyota discriminated against Ms. Williams by failing to reasonably accommodate her disability. The Sixth Circuit result should be affirmed even if an incorrect analysis was employed to reach a correct result.

Alternatively, this Court should review the summary judgment proceedings *de novo* and adjudge Ms. Williams to be ADA disabled as a matter of law because there are no disputed facts, and a correct analysis could not lead "a rational trier of fact"[48] to find she is not disabled.

Alternatively, the case should be remanded to the District Court for a jury trial not only on the issues of whether Ms. Williams is disabled as concerns the major life activities of performing manual tasks, of lifting, and of working, but also on the issues of whether she is disabled because she has a record of disability, § 12102(2)(B), or is regarded as being disabled, § 12102(2)(C).

Respectfully submitted,

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[48] *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

(16)

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IN THE

Supreme Court of the United States

TOYOTA MOTOR MANUFACTURING, KENTUCKY, INC.,

Petitioner,

v.

ELLA WILLIAMS,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

I. THE COURT SHOULD DEAL WITH THIS CASE AS IT CAME HERE AND SET ASIDE THE SIXTH CIRCUIT JUDGMENT.

The Sixth Circuit below found respondent Williams substantially limited in the major life activity of performing manual tasks, and therefore disabled under the Americans with Disabilities Act ("ADA"). The basis for the court's holding was its conclusion that Williams was unable to perform certain manual tasks associated with an assembly-line job in petitioner TMMK's automotive assembly plant. In reaching this result, the court ignored well-established standards governing the determination of disability under the major life activities of both working

and performing manual tasks. Instead, the court created a new, hybrid standard, under which a plaintiff can prove disability by showing "that her manual disability involves a 'class' of manual activities affecting the ability to perform tasks at work." Pet. App. 4a. The effect of the court's ruling is to permit a plaintiff who is neither substantially limited in working nor in performing manual tasks to be found disabled simply on a showing that she is limited in her ability to perform elements of a single job. The petition thus presented the question whether the Sixth Circuit correctly held "that an impairment precluding an individual from performing only a limited number of tasks associated with a specific job qualifies as a disability under the [ADA]." Pet. i.

We restate the holding below and the question presented because neither respondent nor her amici show any interest in defending the former or addressing the latter. Instead, Williams argues that we have "misstated" the holding below. Resp. Br. 15. This is a reprise of the approach she took in opposition to certiorari. *See* Opp. 12 ("Toyota misstates the holding of the Sixth Circuit when Toyota contends the Sixth Circuit found ADA disability based solely upon an impairment from performing only a limited number of tasks associated with a specific job."); *id.* 13 ("Toyota's Petition misstates the Sixth Circuit holding").

We fully responded to this contention at the jurisdictional stage. *See* Pet. Reply 1-3. As we observed then, the Sixth Circuit's decision could not be clearer on this point. The court plainly held that "in order to be disabled the plaintiff must show that her manual disability involves a 'class' of manual activities affecting the ability to perform tasks *at work*." Pet. App. 4a (emphasis added). Thus, the court thought it enough that respondent's impairments did no more than substantially limit "her ability to perform the

range of manual tasks associated with an assembly line job." *Id.*; *see id.* 5a (respondent is disabled if substantially limited in "her ability to perform the manual tasks that are job-related"); *id.* 2a ("key issue" focuses on "plaintiff's physical difficulties in using her hands, arms and shoulders, *as required by her new job*") (emphasis added). We also pointed out that our reading of the Sixth Circuit decision was precisely the way Judge Boggs described it in dissent, *id.* 9a-11a—with nary an objection from the majority that he was misconstruing their words. *See* Pet. Reply 2-3.

Since this Court's grant of certiorari, others have agreed with our reading. The Ninth Circuit recently cited the decision at issue here and noted that "[t]he Sixth Circuit has suggested that the manual-tasks inquiry be further subdivided into separate sub-classes of manual tasks. We doubt that this is the correct approach * * *." *Thornton* v. *McClatchy Newspapers, Inc.*, 261 F.3d 789, 2001 WL 914019, at *6 n.4 (9th Cir. Aug. 15, 2001). The Solicitor General in his brief similarly reads the Sixth Circuit to have "held that respondent could show a substantial limitation on the activity of 'performing manual tasks,' based solely on her inability to perform *work-related* manual tasks." U.S. Br. 9 (emphasis in original). Perhaps most importantly, the Sixth Circuit itself in subsequent decisions has reaffirmed the rule articulated by the panel below as we have understood it. *See Kiphart* v. *Saturn Corp.*, 251 F.3d 573, 584 (6th Cir. 2001) (reviewing in detail the Sixth Circuit's holding in this case and concluding that the plaintiff presented sufficient evidence of disability simply because his "impairments substantially limited his ability to perform an entire class of manual activities associated with assembly-line and product-handling jobs"); *Henderson* v. *Ardco, Inc.*, 247 F.3d 645, 652 (6th Cir. 2001) ("the court's judgment that Ms. Wil-

liams was physically disabled relied on how her impairments 'seriously reduced her ability to perform the manual tasks that are job-related.' This appears to combine assessment of Williams's impairment in manual tasks and her impairment in working * * *.") (brackets omitted).

To support her contrary reading, respondent and her amici rely exclusively on one passage in which the panel majority stated that respondent's impairments "are sufficiently severe to be like deformed limbs and such activities affect manual tasks associated with working, *as well as manual tasks associated with recreation, household chores and living generally*." Pet. App. 6a (emphasis added). *See, e.g.*, Resp. Br. 13; AFL-CIO Br. 2, 4. As the Solicitor General has explained, the italicized language "appears disconnected from the Sixth Circuit's legal analysis." U.S. Br. 15 n.6. We addressed this passage in our opening brief, explaining that the fact that a limitation might "affect" particular areas of Williams's life is far from saying that she is *substantially limited* in performing manual tasks in those areas, as the terms of the ADA require. *See* Pet. Br. 17-18 & n.5 (quoting cases). In the face of that explanation, Williams still contends only that her impairment "affect[s]" activities outside of work. Resp. Br. 9, 20.

The end result is that neither Williams nor her amici defend the holding below, nor do they address the question presented. They resort instead to something resembling appeals to equity. Williams generally argues that she is disabled, asserting in the first sentence of her argument that the court below properly found her disabled "even if the language of the opinion is incorrect." Resp. Br. 22. And her amici brief the case as if the question presented were something along the lines of "How should courts apply summary judgment in ADA cases?" *See, e.g.*,

NELA Br. 6-21; NCD Br. 26-29; ATLA Br. 7-13. Indeed, amicus Association of Trial Lawyers of America boldly asserts that the "primary issue" and "central question" before the Court is "whether the district court * * * improperly took this question [of Ms. Williams's disability] away from the jury," ATLA Br. 3, 7-8, even though the case—submitted on cross-motions for summary judgment—turns on the legal standard for disability, and the parties have no genuine disputes about the facts.[1]

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[1] Williams argues that the Sixth Circuit not only reversed the grant of summary judgment in favor of Toyota, but also held as a matter of law that she was disabled. *See* Resp. Br. 18. We disagree—and so do her amici. *See* ATLA Br. 8; NELA Br. 5; Bazelon Br. 7. As Williams's amici explain, the opinion below notes no fewer than three times that its analysis is based on the record viewed in the light most favorable to the plaintiff—the correct standard in considering the propriety of summary judgment for the defendant, but not in considering whether the plaintiff is entitled to summary judgment. *See* Pet. App. 2a, 4a (twice). The panel majority concluded that the evidence, so viewed, is sufficient "to allow the factfinder to find" that Williams is disabled. *Id.* 4a; *see also id.* 5a (concluding that there was "sufficient evidence to support a finding").

Williams's reading, however, derives some force from the etymology of the majority opinion. The opinion was amended following Williams's petition for rehearing seeking clarification on whether the issues the court did not address—whether Williams was substantially limited in "lifting" or "working," or whether she had a "record" of disability or was "regarded as" disabled—were open on remand. The amended opinion arguably foreclosed the need to examine those issues by declaring Williams disabled and remanding only for a trial on "reasonable accommodation." *See* Resp. Br. 18. But there is no need to resolve the internal inconsistencies in the majority opinion on this question. Whether the Sixth Circuit ruled that Williams was disabled as a matter of law or that a factfinder could so find, it did so pursuant to an erroneous legal standard, and accordingly the judgment for Williams cannot stand.

This Court has made clear, however, that it "disapprove[s] the practice of smuggling additional questions into a case after [it] grant[s] certiorari." *Irvine* v. *California*, 347 U.S. 128, 129 (1954) (Jackson, J.). Rather than accept the invitation to range freely beyond the question presented, the Court should adhere to its customary practice and "deal with the case as it came here and affirm or reverse based on the ground relied on below." *Peralta* v. *Heights Med. Ctr., Inc.*, 485 U.S. 80, 86 (1988). *See Bragdon* v. *Abbott*, 524 U.S. 624, 638 (1998) ("It is our practice to decide cases on the grounds raised and considered in the Court of Appeals and included in the question on which we granted certiorari."); S. Ct. Rule 14.1(a) ("Only the questions set out in the petition, or fairly included therein, will be considered by the Court."). Doing so here should result in overturning the judgment below, because there is no longer any serious dispute that the sole ground relied upon by the Court of Appeals to enter that judgment—that Williams could show substantial impairment in the manual tasks associated with her job—was wrong.

As discussed at length in TMMK's opening brief, the Sixth Circuit decision was founded on a legal error. Instead of examining whether Williams's impairment substantially limited the major life activity of performing manual tasks generally, the court of appeals considered *only* Williams's inability to perform the manual tasks associated with her specific assembly-line job. It was, however, neither sufficient nor necessary for Williams to show a substantial limitation in performing the specialized manual tasks required at work; the proper inquiry is whether she could show a substantial limitation in the *overall* major life activity of performing manual tasks. *See* U.S. Br. 21 n.10.

In this respect, assessing whether someone is substantially limited in the major life activity of performing manual tasks presents difficulties typically not present with such major life activities as seeing, hearing, or speaking. "Performing manual tasks" covers an infinite range of activities; all of us will be more adept at some than at others, and many of us may be substantially limited in specific tasks without being more generally impaired. But just as an individual who could not hear one particular tone, or discern one particular shade, or enunciate one particular consonant, would not be considered substantially limited in the major life activities of hearing, or seeing, or speaking, so too the inability to perform one particular manual task, without more, does not constitute a substantial limitation on the major life activity of performing manual tasks. The limitation must be sufficiently broad, or concern a task sufficiently central to life, to constitute a substantial limitation on the major life activity of performing manual tasks. That is, after all, what the text of the statute requires—an "impairment that substantially limits one or more of the major life activities." 42 U.S.C. § 12102(2)(A).[2] And as we explained in our opening brief, federal courts—except the Sixth Circuit—have accordingly evaluated claims of disability with respect to manual tasks against a wide range of daily manual activities. *See* Pet. Br. 13-14 (quoting cases).

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[2] Amici the Bazelon Center, *et al.*, pose the crucial question and then dramatically fail to answer it. *See* Bazelon Br. 15 ("[A]t what point does an individual's substantial impairment in the performance of a few manual tasks rise to the level of impairing the general category of 'performing manual tasks' as compared to the average person in the general population? The answer is that one who is able to perform manual tasks only at a level substantially below the level at which an average person can perform such tasks is disabled under the ADA.").

Respondent offers no persuasive argument against overturning the judgment below. She invokes the general maxim that remedial statutes should be liberally construed to effectuate their purpose, *see* Resp. Br. 30-34, but such platitudes cannot trump "the fundamental statutory requirement" of the ADA "that only impairments causing 'substantial limitations' in individuals' ability to perform major life activities constitute disabilities." *Albertson's, Inc.* v. *Kirkingburg*, 527 U.S. 555, 565 (1999). *See* 42 U.S.C. § 12102(2)(A). A broad but counter-textual interpretation of a statute is rendered no more faithful to congressional intent simply because the statute embodies a remedial purpose:

> [N]o legislation pursues its purposes at all costs. Deciding what competing value will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice—and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law. [*Pension Benefit Guar. Corp.* v. *LTV Corp.*, 496 U.S. 633, 646-647 (1990) (quoting *Rodriguez* v. *United States*, 480 U.S. 522, 525-526 (1987)) (emphasis in original).]

Congress quite intentionally distinguished between individuals afflicted with truly disabling[3] impairments and

[3] Contrary to the suggestion of amicus National Council on Disability, we have not used the phrase "truly disabled" as a term of art intended to hearken back to "an era where the 'disability' label excused people from societal obligations." NCD Br. 14. We use that term, as many others have, simply to refer to the "discrete and insular minority" properly encompassed by the ADA's definition of disability, 42 U.S.C. § 12101(a)(7)—those whose impairments *substantially* limit them in one or more major life activities. *See Francis* v. *City of Meridien*, 129 F.3d 281, 286 (2d Cir. 1997) (ADA ensures that "truly disabled, but genuinely capable, individuals will not face discrimination in employment because of stereotypes about the insurmountability of their handicaps") (citation omitted).

those hampered by impairments that do not substantially limit major life functions, and it is thus no answer to say that the remedial nature of the ADA should dictate that anyone with a physical impairment necessarily comes within the statute's sweep. That is particularly true given that expanding the statute's reach beyond the "discrete and insular minority" contemplated by Congress, 42 U.S.C. § 12101(a)(7), would disserve the remedial purpose of the Act by reducing available opportunities for reasonable accommodation of those Congress intended to protect. *See* Pet. Br. 29-33.

Nor does respondent get anywhere with the unremarkable proposition that the ADA must be considered as a whole. Resp. Br. 26-30. From this premise, respondent and some of her amici argue that adopting a definition of disability more restrictive than the Sixth Circuit's standard would give rise to an intractable paradox whereby only those too impaired to work at all would be considered disabled. That would effectively disqualify them from coverage under the Act, since the ADA extends protection only to "qualified individual[s] with a disability"—defined as those who "can perform the essential functions" of their job. 42 U.S.C. § 12111(8). Respondent's Catch-22 scenario is wrong.

To require, as a condition of demonstrating disability under the major life activity of performing manual tasks, that a plaintiff be significantly restricted in a range of basic or everyday manual functions is no different than requiring individuals to be significantly restricted in hearing or seeing to qualify as substantially limited in those major life

activities. Yet such a standard in the hearing and seeing contexts has obviously not spawned the paradox respondent fears, because the ADA defines a "qualified individual with a disability" as someone who can perform the essential functions of the job "*with* or without *reasonable accommodation*." 42 U.S.C. § 12111(8) (emphases added).

To be clear: it should come as no surprise that an individual who meets the Act's definition of disabled because she is substantially limited in the major life activity of performing manual tasks would have difficulty with jobs that involve such tasks, just as an individual substantially limited in the major life activities of seeing, hearing, or walking would have difficulty with jobs involving those activities. The issue is whether the individual can nonetheless perform the job with a reasonable accommodation—an indicator light for the deaf medical technician, for example, *see* S. Rep. No. 101-116, at 10 (1989)—not whether the threshold definition of disability should be lowered to include cases in which the impairment does not inhibit performing the job at all.[4]

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[4] The contention of amicus National Employment Lawyers Association that the lower courts are being "overly restrictive" in applying the ADA—NELA brands no fewer than 28 published opinions "absurd[]," NELA Br. 14, 18—is based on a startling misreading of this Court's decision in *School Board of Nassau County* v. *Arline*, 480 U.S. 273 (1987). The Court in that case did not find, as NELA contends, that the plaintiff's hospitalization for tuberculosis "*22 years prior to the adverse employment action*" established that she was substantially limited in a major life activity at the time of the lawsuit. NELA Br. 18 (emphasis in original). The Court was construing the "record of * * * impairment" prong of the Rehabilitation Act's definition of "handicapped individual," and noted that the plaintiff's hospitalization "suffices to establish that she has a 'record of * * * impairment' " under the Act. 480 U.S. at 281. That would of course be true regardless of the date of hospitalization.

II. WILLIAMS DID NOT ESTABLISH A GENUINE ISSUE OF MATERIAL FACT AS TO WHETHER SHE WAS SUBSTANTIALLY LIMITED IN HER ABILITY TO PERFORM MANUAL TASKS.

The Sixth Circuit analyzed the case under the major life activity of performing manual tasks because that was Williams's "primar[y]" assertion. Pet. App. 4a. The court did not address Williams's claim that she was also substantially limited in the asserted major life activities of lifting and working, noting that "her counsel conceded during oral argument that Williams' strongest claim pertained to the major life activity of performing manual tasks." *Id.* 4a n.1.[5] The court also did not address Williams's contention that she had a "record" of a qualifying impairment or was "regarded as" disabled. *See* Pet. App. 6a; 42 U.S.C. § 12102(2)(B), (C). To the extent these

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[5] That concession appears wise. Even if "lifting" is considered a "major life activity," Williams's restriction against lifting more than 20 pounds or more than 10 pounds frequently does not demonstrate substantial impairment. *See, e.g.*, *Marinelli* v. *City of Erie*, 216 F.3d 354, 364 (3d Cir. 2000) ("As [plaintiff's] ten-pound limitation is not far removed from the twenty-five pound restrictions our sister circuits have held not to render one disabled under the ADA, we would also hold that [plaintiff's] lifting restriction does not render him sufficiently different from the general population such that he is substantially limited in his ability to lift."). As for the major life activity of working, one reason the Sixth Circuit's approach to the issue of manual-task impairments is so problematic is that it circumvents this Court's ruling in *Sutton* v. *United Air Lines, Inc.*, 527 U.S. 471, 492 (1999), that a plaintiff cannot be viewed as substantially limited in the major life activity of working simply because of an impairment that precludes her from one type of job, a specialized job, or a particular job of choice. *See* Pet. Br. 19-21. Williams utterly failed to adduce evidence of substantial limitation in working with the specificity required by *Sutton* and the applicable federal regulation. 29 C.F.R. § 1630.2(j)(3)(i). *See* Pet. App. 37a-42a.

issues are open, they should be considered on remand and should not be addressed for the first time here. *See NCAA* v. *Smith*, 525 U.S. 459, 470 (1999) ("we do not decide in the first instance issues not decided below"); *Matsushita Elec. Indus. Co.* v. *Epstein*, 516 U.S. 367, 379 n.5 (1996) ("While it is true that a respondent may defend a judgment on alternative grounds, [this Court] generally does not address arguments that were not the basis for the decision below.").[6]

The Court may also leave for remand the question whether Williams could establish that she is substantially limited in the major life activity of performing manual tasks under a proper legal analysis. *See, e.g., Adarand Constructors, Inc.* v. *Peña*, 515 U.S. 200, 237-239 (1995). It also seems appropriate, however, for the Court itself to answer that question. The parties have joined issue on the question, the record is fully developed, and the proper disposition is clear. *See New York City Transit Auth.* v. *Beazer*, 440 U.S. 568, 583 n.24 (1979) ("We conclude that it is appropriate to reach the issue in this case, rather than remand it to the Court of Appeals, because it was fully aired before the District Court, it involves the application of settled legal principles to uncontroversial facts, and it has been carefully briefed in this Court without any of the

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[6] Issues that are *not* open on remand include those surrounding Williams's allegations that TMMK violated the ADA by discontinuing her employment when she refused to return to work. *See* Pet. App. 34a (noting that Williams "charged TMMK with two distinct acts of discrimination"—failure to accommodate in the fall of 1996 and termination in January 1997). The Sixth Circuit affirmed the grant of summary judgment in favor of TMMK on the termination claim, *see id.* 6a-8a, and Williams did not seek further review of that decision. Respondent's suggestion that "this case seeks to compel Toyota to continue reasonable accommodations," Resp. Br. 1, is therefore wholly misguided.

parties even suggesting the possibility of a remand."). Even granting Williams all reasonable inferences, she has failed to develop a record capable of sustaining a finding that she is substantially limited in performing manual tasks. Indeed, Williams's work history and deposition testimony demonstrate that she is capable of performing a wide range of manual tasks.

Summary judgment is appropriate when the plaintiff "fails to make a showing sufficient to establish the existence of an element essential to [her] case, and on which [she] will bear the burden of proof at trial." *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 322 (1986). Because Williams "bears the burden of proving that she is a 'qualified individual with a disability,' " *Cleveland* v. *Policy Sys. Mgmt. Corp.*, 526 U.S. 795, 806 (1999), she must designate specific facts demonstrating the existence of a genuine issue for trial on this question. *Celotex*, 477 U.S. at 324. If Williams is to survive summary judgment, these facts must be sufficient to allow a reasonable jury to return a verdict in her favor. *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986).

No reasonable jury could conclude that Williams suffers from an impairment that substantially limits the major life activity of performing manual tasks, because no one could reasonably infer that an inability to grip a wooden tool while repetitively wiping down cars with one's arms elevated above the shoulders demonstrates a "substantial limitation" in performing the basic manual tasks that an average person can perform with little or no difficulty. Indeed, courts have been justifiably cautious when asked to treat as disabled individuals who, although capable of performing basic tasks, are restricted from performing such tasks repeatedly. *See, e.g., Thornton* v. *McClatchy Newspapers, Inc.*, 2001 WL 914019, at *5 ("That [plain-

tiff] could perform *certain* manual tasks for only a limited period of time does not present a triable issue that she was 'substantially limited' in a *broad* range of manual tasks.") (emphases added); *Chanda* v. *Engelhard/ICC*, 234 F.3d 1219, 1223 (11th Cir. 2000) ("[Plaintiff's] only restrictions that were severe, of lengthy duration, and with a long term impact were related to a narrow category of tasks, such as typing or cutting foamboard *for an extensive period of time*") (emphasis added); *Cutler* v. *Hamden Bd. of Educ.*, 150 F. Supp. 2d 356, 359-360 (D. Conn. 2001) (rejecting claim that plaintiff suffered substantial limitation on ability to perform manual tasks because of restriction on performing rapid and repetitive motions with right arm); *Shpargel* v. *Stage & Co.*, 914 F. Supp. 1468, 1474 (E.D. Mich. 1996) (granting summary judgment against plaintiff where plaintiff's only difficulty was using his hands to work more than eight hours per day).

The record is devoid of evidence that Williams's impairment crosses the threshold separating difficulties that simply "affect" manual tasks from those that also "substantially limit" them. Williams herself hardly suggests otherwise. She states that she needs "occasional" help getting dressed, that "[g]ardening is limited, housework is limited, and driving an automobile is curtailed." Resp. Br. 9; *see* J.A. 32, 35-36. She also notes that she is under a 20-pound lifting restriction. *Id.*; *see* J.A. 45. Noticeably absent from Williams's statements—and from the record—is *any* indication that Williams is "*substantially* limited" in performing manual tasks in general. Any contention to the contrary is belied by the litany of activities Williams conceded she was capable of performing.[7] Williams was able to perform the manual tasks in her former assembly-line job. J.A. 13. These tasks included using both her hands to rub "back and forth" against an automobile's exterior. *Id.* 22. Furthermore, at one point, Williams's position necessitated opening and shutting car doors, which involved grasping the doors, and shutting hoods and trunks. *Id.* 25-28. When the plant was operating at optimal speed, Williams was opening and closing two doors and closing a trunk or hood every 54 seconds. *Id.* 28. In addition, Williams admitted in deposition testimony that she was able to brush her teeth, wash her face, bathe herself, garden, prepare breakfast, do laundry, and pick up and organize around her home. *Id.* 32-34.

What Williams cannot do—tasks that "require the gripping of tools and arms to be kept overhead or at shoulder level repetitively for an extended period of time," Pet. App. 6a—is certainly insubstantial when compared to the broad range of limitations imposed on the individuals quoted in amicus AFL-CIO's brief. *See* AFL-CIO Br. 14-15. Whatever the relevance of those narratives, there is nothing in the record in *this* case remotely suggesting that Williams has difficulty doing "almost anything you need your hands to do," or can "hardly move" her fingers. *Id.*[8]

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[7] It bears repeating that the Sixth Circuit recognized that Williams could "perform a range of isolated non-repetitive manual tasks performed over a short period of time, such as tending to her personal hygiene or carrying out personal or household chores," notwithstanding her purported limitations. Pet. App. 4a.

[8] As respondent herself acknowledges (Resp. Br. 38), "whether a person has a disability under the ADA is an individualized inquiry." *Sutton*, 527 U.S. at 483. For that reason, the 35 disparate diseases and disorders cited in respondent's brief (pp. 36-38) that were found to have substantially limited particular plaintiffs in Rehabilitation Act cases are irrelevant in determining whether

The broad range of tasks that Williams was able to perform, coupled with the narrow scope of her limitations, demonstrates that judgment for TMMK is appropriate. *See Thornton*, 2001 WL 914019, at *6 ("In this case, [plaintiff] was able to perform a wide range of manual tasks, including grocery shopping, driving, making beds, doing laundry, and dressing herself. Her inability to type and write for extended periods of time is not sufficient to outweigh the large number of manual tasks that she can perform."); *Chanda*, 234 F.3d at 1223 (no genuine issue of material fact regarding substantial limitation on manual tasks when plaintiff was able to perform range of daily activities); *Hilburn* v. *Murata Elecs. N. Am.*, 181 F.3d 1220, 1227-28 (11th Cir. 1999) (no genuine issue of material fact regarding substantial limitation on manual tasks when plaintiff under a 10-pound lifting restriction was otherwise able to bathe, dress, write, cook, and perform housework); *Dutcher* v. *Ingalls Shipbuilding*, 53 F.3d 723, 726 (5th Cir. 1995) (evidence that plaintiff's arm injury restricted heavy lifting and repetitive rotational movements and impaired plaintiff's ability to pick up small objects, hold objects tightly, and turn a car's ignition insufficient to survive motion for summary judgment when plaintiff could perform normal daily activities of living).

It may be that a particular manual task is so central to life that a substantial limitation on that task alone would satisfy the statutory definition of disability. That question is what divided the court in *Thornton*, a case involving an impairment limiting the ability to type and handwrite.

Williams's impairment substantially limits *her* in the major life activity of performing manual tasks. *See Forrisi* v. *Bowen*, 794 F.2d 931, 933 (4th Cir. 1986) ("The definitional task (of determining who is a handicapped person) cannot be accomplished merely through abstract lists and categories of impairments.").

Compare 2000 WL 914019, at *5 ("That Thornton could perform certain manual tasks for only a limited period of time does not present a triable issue that she was 'substantially limited' in a broad range of manual tasks.") *with id.* at *15 (an "impairment in carrying out manual tasks *can* be sufficiently substantial simply because of the importance of those particular manual tasks in modern society") (Berzon, J., dissenting) (emphasis in original). But that question is not presented here. The particular manual task at issue here—"gripping of tools and repetitive work with hands and arms extended at or above shoulder levels for extended periods of time," Pet. App. 4a—is not arguably so central to life that a substantial limitation as to it could plausibly be regarded as a substantial limitation on the major life activity of performing manual tasks generally. Williams and her amici argue that such a limitation may affect the ability to work more broadly, but that simply confirms that her impairment should be analyzed under the major life activity of working, with its particular evidentiary requirements.

The Sixth Circuit's judgment should therefore be reversed, and the District Court's judgment in TMMK's favor on the major life activity of performing manual tasks should be reinstated.

CONCLUSION

For the foregoing reasons, and those in petitioner's opening brief, the judgment below should be reversed.

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No. 00-1089

In the Supreme Court of the United States

TOYOTA MOTOR MANUFACTURING, KENTUCKY, INC.,
PETITIONER

v.

ELLA WILLIAMS

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether an impairment that limits an individual's ability to perform particular job-related manual tasks can constitute a "disability" under the Americans with Disabilities Act of 1990, 42 U.S.C. 12102(2)(A), even if there has been no finding that the plaintiff has been excluded from a class of jobs or a sufficiently broad range of jobs to establish a substantial limitation on the "major life activity" of "working," and no finding that the plaintiff's impairment substantially limits her ability to perform manual tasks outside of work.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

This case concerns the proper understanding of the term "disability" as that term is used in the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. 12101 *et seq.* The Department of Justice and the Equal Employment Opportunity Commission (EEOC) are charged with enforcing the ADA, and those agencies have promulgated regulations and interpretive guidance concerning that statutory term. The Department of Labor has promulgated comparable regulations for purposes of the Rehabilitation Act of 1973 (Rehabilitation Act), 29 U.S.C. 701 *et seq.* Moreover, because the Rehabilitation Act makes the standards of Title I of the ADA (42 U.S.C. 12111-12117) applicable to the federal government, see 29 U.S.C. 791(d) (1994 & Supp.

V 1999), the United States has a significant interest in the principles used to determine whether an individual has a "disability" within the meaning of the ADA.

STATEMENT

1. Title I of the ADA prohibits discrimination by any covered entity "against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. 12112(a). In pertinent part, the ADA defines the term "disability" as "a physical or mental impairment that substantially limits one or more of the major life activities of such individual." 42 U.S.C. 12102(2)(A). The forms of employment discrimination prohibited by Title I of the ADA include "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless [the employer] can demonstrate that the accommodation would impose an undue hardship on the operation of the business." 42 U.S.C. 12112(b)(5)(A).

EEOC regulations implementing Title I of the ADA define the term "major life activities" to include "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 29 C.F.R. 1630.2(i). A regulation promulgated by the Justice Department contains the same definition of the term "major life activities" for purposes of Section 504 of the Rehabilitation Act, see 28 C.F.R. 41.31(b)(2), as does a regulation promulgated by the Department of Labor for purposes of Section 503 of the Rehabilitation Act, see 41 C.F.R.

60-741.2(p). The EEOC's Title I regulations provide that an impairment "substantially limits" an individual if, as a result of the impairment, the person is (i) "[u]nable to perform a major life activity that the average person in the general population can perform," or (ii) "[s]ignificantly restricted as to the condition, manner or duration under which [he] can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity." 29 C.F.R. 1630.2(j)(1). Those regulations contain a special definition of the term "substantially limits" with respect to the major life activity of working. In that context,

> [t]he term *substantially limits* means significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.

29 C.F.R. 1630.2(j)(3)(i).

2. Beginning in 1990, respondent Ella Williams was employed as an assembly line worker in an auto manufacturing plant operated by petitioner Toyota Motor Manufacturing, Kentucky, Inc. Pet. App. 24a. As a result of her prolonged use of pneumatic tools, respondent developed carpal tunnel syndrome and tendinitis in her arms and hands. *Id.* at 2a, 24a.[1] Petitioner

[1] Because this case arises out of respondent's appeal from the district court's award of summary judgment to petitioner, the facts as set forth in the text reflect the record evidence taken in the light most favorable to respondent. See Pet. App. 2a.

subsequently placed respondent on a team in the Quality Control Inspection Operations unit of the assembly line. *Id.* at 25a. Respondent spent approximately three years inspecting cars on the assembly line for defective paint and manually wiping down each newly painted car as it passed on the conveyor. *Id.* at 2a, 26a. Her duties were then expanded to include new tasks, which required her to grip a block of wood and to keep her hands and arms around shoulder height repetitively over several hours. *Id.* at 2a, 26a-27a. Her ligament and muscle problems reappeared in a more severe form as a result of the new job, and she developed tendinitis in her shoulders and neck as well. *Id.* at 2a, 27a. Respondent requested to be assigned back to her former functions, which she could perform without difficulty. *Ibid.* Respondent alleges that petitioner refused to assign her back to her former job in the paint inspection section, and that the refusal constituted a failure to provide reasonable accommodation as required by the ADA. *Id.* at 2a, 27a-28a.

3. Respondent filed suit in federal district court, alleging that petitioner had violated, *inter alia*, the ADA. The district court granted petitioner's motion for summary judgment. Pet. App. 23a-54a. With respect to respondent's ADA claim, the court held that respondent was not substantially limited in any major life activity and therefore did not have a "disability" within the meaning of 42 U.S.C. 12102(2)(A).[2] Pet. App. 34a-42a.

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[2] The ADA also defines the term "disability" to include "a record of such an impairment," 42 U.S.C. 12102(2)(B), or "being regarded as having such an impairment," 42 U.S.C. 12102(2)(C). The district court held that respondent could not establish that she had a "disability" under either of those provisions. Pet. App. 43a-47a. Those holdings are not at issue in this Court. See note 3, *infra*.

Respondent contended that she was substantially limited in the major life activities of (1) performing manual tasks, (2) housework, (3) gardening, (4) playing with her children, (5) lifting, and (6) working. Pet. App. 34a, 37a. The district court rejected allegations (2)-(4) on the ground that "[w]hen compared to activities such as walking, seeing, hearing, speaking and breathing, the Court cannot find that gardening, housework, playing with, or otherwise recreating with others, are such significant activities to warrant their inclusion into the 'statutory rubric' of major life activities." *Id.* at 35a. The court found that allegation (1) was "irretrievably contradicted by [respondent's] continual insistence that she could perform the tasks in assembly and paint inspection without difficulty," since those duties required the performance of manual tasks. *Id.* at 36a. The court also stated that "no rational juror could conclude that [respondent] is substantially limited in her ability to perform manual tasks" because respondent had "failed to present any evidence regarding the nature and severity of [her] impairment, the duration or expected duration of her impairment, or the permanent or long term impact resulting from the impairment." *Ibid.* The district court also rejected allegation (5) because respondent had failed to present evidence sufficient to persuade a rational juror that her ability to lift was substantially limited. *Id.* at 36a-37a.

The district court then addressed respondent's claim that she was substantially limited in the major life activity of "working." Pet. App. 37a-42a. The court explained that, to prevail on that theory, respondent was required to show that her impairment excluded her from a significant range of jobs. *Id.* at 37a-38a. The court acknowledged that respondent had offered expert vocational evidence that, as a result of her impairment,

"the number of jobs in the economy that [she] can perform has been reduced by 50% to 55%." *Id.* at 38a. It stated, however, that under the applicable regulations, the "determination of whether one is substantially limited in the major life activity of working requires an examination, and therefore evidence, of a claimant's ability, or inability, to access the job market *in her own geographical area*." *Id.* at 40a. Based on its view that the evidence proffered by respondent "offers no assistance in evaluating her true employability within *her own geographical area*," the district court concluded that respondent "cannot show that she is substantially limited in the major life activity of working." *Ibid.*

4. The court of appeals reversed. Pet. App. 1a-11a. The court's analysis focused on respondent's ability to perform work-related manual tasks. The court of appeals cited the EEOC regulation that specifically addresses limitations on the "major life activity" of "working," see 29 C.F.R. 1630.2(j)(3) (quoted at p. 3, *supra*), and this Court's discussion of that regulation in *Sutton* v. *United Air Lines, Inc.*, 527 U.S. 471 (1999), for the proposition that an individual "must be precluded from * * * a substantial class of jobs" in order to establish disability based on the major life activity of "working." Pet. App. 4a. The court recognized that respondent "asserts primarily that her impairments disable her from performing manual tasks, a different disability from 'working.'" *Ibid.* (footnote omitted). The court of appeals nevertheless concluded that "in order to be disabled [respondent] must show that her manual disability involves a 'class' of manual activities affecting the ability to perform tasks at work." *Ibid.*

Applying that standard, the court concluded that

> taking the evidence in the light most favorable to the plaintiff, * * * [respondent's] set of impairments to her arms, shoulders and neck are sufficiently disabling to allow the factfinder to find she crosses the threshold into the protected class of individuals under the ADA who must be accorded reasonable accommodation. Her ailments are analogous to having missing, damaged or deformed limbs that prevent her from doing the tasks associated with certain types of manual assembly line jobs, manual product handling jobs and manual building trade jobs (painting, plumbing, roofing, etc.) that require the gripping of tools and repetitive work with hands and arms extended at or above shoulder levels for extended periods of time.

Ibid. The court of appeals acknowledged that respondent could "perform a range of isolated, non-repetitive manual tasks performed over a short period of time, such as tending to her personal hygiene or carrying out personal or household chores." *Ibid.* The court concluded, however, that respondent's ability to perform those tasks "does not effect [*sic*] a determination that her impairment substantially limits her ability to perform the range of manual tasks associated with an assembly line job." *Ibid.*[3]

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[3] The court of appeals stated that "[a]lthough [respondent] has also claimed that she is substantially limited in the major life activities of lifting and working, in addition to manual tasks, her counsel conceded during oral argument that [respondent's] strongest claim pertained to the major life activity of performing manual tasks." Pet. App. 4a n.1. In light of its determination that respondent had presented sufficient evidence with respect to the performance of manual tasks, the court declined to determine whether respondent was also "substantially limited as to the major life activities of lifting or working." *Id.* at 5a. For similar reasons,

Judge Boggs dissented from the court of appeals' disposition of respondent's ADA claim. He noted that although respondent's physical impairment prevented her from performing the tasks associated with a discrete range of jobs, "this inability to perform certain types of tasks would not likely constitute being disabled with regard to the major life activity of working. In particular, this court has held that the inability to perform a single, particular job does not constitute a substantial limitation on working." Pet. App. 9a (citing *Gilday* v. *Mecosta County*, 124 F.3d 760, 767 (6th Cir. 1997) (Kennedy, J., concurring in part and dissenting in part) (collecting cases)).

Judge Boggs concluded that respondent was likewise unable to demonstrate a substantial limitation on the "major life activity" of "performing manual tasks." He explained that the record demonstrated respondent's ability to perform many work-related manual tasks, as well as "the manual tasks of brushing her teeth, laundering her clothes, and doing some driving." Pet. App. 9a. In Judge Boggs's view, the manual tasks that respondent was demonstrably unable to perform were almost exclusively tasks connected to a narrow range of jobs. *Id.* at 9a-10a. Judge Boggs concluded that if respondent's inability to perform those tasks was an insufficient basis for finding a substantial limitation on her ability to work, there was no logical ground for treating her impairment as a substantial limitation on her ability to perform manual tasks. *Id.* at 10a-11a.

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the court found it unnecessary to address respondent's alternative claims that she had a "record" of qualifying impairment, see 42 U.S.C. 12102(2)(B), or was "regarded as" disabled, see 42 U.S.C. 12102(2)(C). Pet. App. 6a.

SUMMARY OF ARGUMENT

Under the pertinent EEOC regulations and this Court's decision in *Sutton* v. *United Air Lines, Inc.*, 527 U.S. 471 (1999), an ADA plaintiff cannot establish that he is "substantially limited" in the "major life activity" of "working" simply through proof that his impairment precludes him from performing a particular job or a narrow category of jobs. Rather, an individual is "substantially limited" in "working" only if his impairment excludes him from a class of jobs or a broad range of jobs in various classes. Where a plaintiff alleges that he is substantially limited in the activity of "performing manual tasks," and the tasks he identifies are solely work-related, the plaintiff should likewise be required to show that as a result of his impairment he is excluded from a class of jobs or a broad range of jobs. Any other approach would permit circumvention of the rules that govern claims based on "working," because an inability to perform a particular job can almost always be recharacterized as an inability to perform the manual tasks or functions associated with that job.

The court of appeals decided this case on the apparent assumption that respondent was *not* substantially limited in the major life activity of "working." The court nevertheless held that respondent could show a substantial limitation on the activity of "performing manual tasks," based solely on her inability to perform *work-related* manual tasks. That approach was erroneous and would subvert the established rule that a plaintiff must prove exclusion from a class of jobs or a broad range of jobs in order to establish disability based on "working."

The approach adopted by the court of appeals not only threatens to circumvent the proper analysis of the

major life activity of "working," but also produces a truncated and incomplete analysis of the major life activity of "performing manual tasks." By focusing only on manual tasks undertaken in the workplace, the court of appeals failed to evaluate the full extent of respondent's limitations with respect to manual tasks generally. In considering major life activities other than working, judicial inquiry cannot properly be limited to effects of the individual's impairment that are evidenced in the workplace. Indeed, a principal goal of the ADA is to ensure that disabilities that do not affect a person's actual ability to function in the workplace will not be used as a basis for irrationally limiting the employment opportunities of qualified disabled individuals.

For the foregoing reasons, the court of appeals employed an incorrect legal analysis. Accordingly, the court's judgment should be vacated and the case should be remanded for further proceedings. On remand, respondent may be able to demonstrate, under the appropriate legal standards, that the record evidence is sufficient to preclude summary judgment for petitioner on the question whether respondent is substantially limited as to (a) working and/or (b) performing manual tasks.

ARGUMENT

I. THE COURT OF APPEALS' APPROACH TO THE MAJOR LIFE ACTIVITY OF "PERFORMING MANUAL TASKS" WOULD SUBVERT THE ESTABLISHED RULE THAT AN INDIVIDUAL IS SUBSTANTIALLY LIMITED IN THE MAJOR LIFE ACTIVITY OF "WORKING" ONLY IF HIS IMPAIRMENT EXCLUDES HIM FROM A CLASS OR BROAD RANGE OF JOBS

A. The EEOC's regulations provide that, in order to establish a substantial limitation in the major life activity of working, a plaintiff must show that he is "significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities." 29 C.F.R. 1630.2(j)(3)(i). In *Sutton* v. *United Air Lines, Inc.*, 527 U.S. 471 (1999), this Court "[a]ssum[ed] without deciding that working is a major life activity and that the EEOC regulations interpreting the term 'substantially limits' are reasonable." *Id.* at 492. Applying those regulations, the Court held that "[w]hen the major life activity under consideration is that of working, the statutory phrase 'substantially limits' requires, at a minimum, that plaintiffs allege they are unable to work in a broad class of jobs." *Id.* at 491. It is therefore clear that a plaintiff cannot establish that he is "substantially limit[ed]" in the "major life activity" of "working" simply through proof that his impairment precludes him from performing a particular job or a narrow category of jobs. See, *e.g.*, *Duncan* v. *WMATA*, 240 F.3d 1110, 1115 (D.C. Cir. 2001) (en banc) (testimony that the plaintiff "was not qualified for the particular kind of job—truck dri-

ver—for which he chose to apply" was insufficient to demonstrate that the plaintiff was substantially limited in the major life activity of working), petition for cert. pending, No. 00-1776; cf. *Murphy* v. *UPS*, 527 U.S. 516, 523 (1999) ("to be regarded as substantially limited in the major life activity of working, one must be regarded as precluded from more than a particular job").

B. An inability to perform a particular job virtually always can be recharacterized as an inability to perform the manual tasks or functions associated with that job. The limiting principle described above would therefore be wholly undermined if a plaintiff whose impairment excluded him from an employment category too small to constitute a class of jobs or a broad range of jobs (and who therefore could not show a substantial limitation on the major life activity of "working") could nevertheless establish a disability based solely on his inability to perform the manual tasks associated with that narrow category of jobs. If a plaintiff claims that he is "substantially limited" in the activity of "performing manual tasks," and if the tasks he identifies are solely work-related, his inability to perform those tasks should be regarded as a "disability" only if the category of jobs from which he is thereby excluded is sufficiently broad so that he is substantially limited in "working."[4]

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[4] The situation described in the text—*i.e.*, where a plaintiff attempts to prove a substantial limitation on the performance of manual tasks solely by reference to work-related tasks—may not arise with great frequency, because a physical impairment that affects a plaintiff's ability to work will often have effects outside the workplace as well. That will not always be true, however. For example, a person whose impairment renders him unable to perform a particular task continuously or repetitively for a prolonged period of time, see Pet. App. 4a (stating that respondent's impairments "prevent her from doing the tasks associated with certain types of * * * jobs * * * that require the gripping of tools and repetitive work with hands and arms extended at or above shoulder levels for extended periods of time"), may be excluded from certain jobs without being significantly restricted in other areas of his life. An impairment that renders an individual unable to perform an especially demanding task—*e.g.*, to lift very heavy objects, or to perform delicate operations requiring an unusual degree of dexterity—may also disqualify the individual from particular jobs without restricting him outside the workplace (or in the workplace for any class or broad range of jobs). Such determinations are to be made on an individualized basis. See *Sutton*, 527 U.S. at 483.

C. In granting petitioner's motion for summary judgment, the district court found that respondent had failed to present evidence sufficient to persuade a reasonable juror that she was substantially limited in the major life activity of "working." See Pet. App. 37a-42a. Although the court of appeals did not specifically address that conclusion, the court appeared to decide this case on the assumption that respondent was *not* excluded from a class of jobs or a sufficiently broad range of jobs to allow her to establish a substantial limitation on her ability to work.[5]

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[5] The precise basis of that assumption is unclear. The court of appeals stated that "[respondent] asserts primarily that her impairments disable her from performing manual tasks, a different disability from 'working,' the disability at issue in the *Sutton* case." Pet. App. 4a (footnote omitted). The court further observed that "[a]lthough [respondent] has also claimed that she is substantially limited in the major life activities of lifting and working, in addition to manual tasks, her counsel conceded during oral argument that [respondent's] strongest claim pertained to the major life activity of performing manual tasks." *Id.* at 4a n.1. Those statements might suggest that the court understood respondent essentially to have conceded that she could not establish a substantial limitation on the "major life activity" of "working." On the other hand, the court also stated that "[b]ecause we conclude that [respondent] is substantially limited in performing manual tasks, we do not need

The court of appeals nevertheless held that respondent could show a substantial limitation on the activity of "performing manual tasks," based solely on her inability to perform work-related tasks. Thus, the court stated that "in order to be disabled [respondent] must show that her manual disability involves a 'class' of manual activities affecting the ability to perform tasks at work." Pet. App. 4a. It found that respondent's "ailments are analogous to having missing, damaged or deformed limbs that prevent her from doing the tasks associated with certain types of * * * jobs * * * that require the gripping of tools and repetitive work with hands and arms extended at or above shoulder levels for extended periods of time." *Ibid.* The court further observed that "[t]he fact that [respondent] can perform a range of isolated, non-repetitive manual tasks performed over a short period of time, such as tending to her personal hygiene or carrying out personal or household chores, does not effect [*sic*] a determination that her impairment substantially limits her ability to perform the range of manual tasks associated with an assembly line job." *Ibid.* The court also described respondent's claim as resting on "the rather simple concept that she is disabled as to performing manual tasks because she suffers from a severe impairment to her limbs, shoulders and neck that seriously reduces her ability to perform the manual tasks that are job-related." *Id.* at 5a.

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to determine whether [respondent] is substantially limited as to the major life activities of lifting or working." *Id.* at 5a. That formulation suggests that the court simply assumed, *arguendo*, that respondent could not resist summary judgment with respect to "working."

Those statements strongly suggest an exclusive focus on *work-related* manual tasks.[6] And a subsequent Sixth Circuit decision construes the decision below in precisely that manner. In *Kiphart* v. *Saturn Corp.*, No. 99-6656, 2001 WL 587850 (May 31, 2001), the court stated that "[t]o demonstrate a substantial limitation in the performance of manual tasks, a plaintiff must prove his 'manual disability involves a "class" of manual activities affecting the ability to perform tasks at work.'" *Id.* at *8 (quoting Pet. App. 4a). The *Kiphart* court's description of the court of appeals' opinion in this case (see *ibid.*) focused solely on the evidence suggesting that respondent was unable to perform various *work-related* manual tasks. Thus, in *Kiphart* as in the instant case, the Sixth Circuit held that the plaintiff could establish a substantial limitation on the "major life activity" of "performing manual tasks," based solely on work-related manual tasks, without deciding whether the plaintiff was substantially limited in the "major life activity" of "working."[7] That approach is erroneous and would subvert the established rule that a plaintiff must prove exclusion from a class of

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[6] The court of appeals did state later in its opinion that respondent's impairments "are sufficiently severe to be like deformed limbs and such activities affect manual tasks associated with working, *as well as manual tasks associated with recreation, household chores and living generally*." Pet. App. 6a (emphasis added). But that observation appears disconnected from the Sixth Circuit's legal analysis.

[7] The *Kiphart* court concluded that "a reasonable jury could have determined Kiphart's impairments substantially limited his ability to perform an entire class of manual activities associated with assembly-line and product-handling jobs involving the use of vibrating hand-held power tools and requiring frequent, repetitive twisting, bending, or flexing of the wrists, elbows, or neck." 2001 WL 587850, at *9.

jobs or a broad range of jobs in various classes in order to establish disability based on "working." See pp. 11-12, *supra*. Limiting the inquiry to the plaintiff's ability or inability to perform manual tasks in the workplace leads naturally to a focus on the employee's ability to perform the tasks associated with her particular job. The EEOC regulations, and this Court's decision in *Sutton*, preclude such a job-specific focus and mandate a broader perspective.

The court of appeals suggested (Pet. App. 5a-6a) that its mode of analysis was consistent with (or, indeed, mandated by) the principle that a court should consider the major life activity of working only "[i]f an individual is not substantially limited with respect to any other major life activity." 29 C.F.R. Pt. 1630, App. § 1630.2(j); see *Sutton*, 527 U.S. at 492. But that direction as to the appropriate order of proceeding presupposes a proper application of tests for major life activities other than working. The decision below improperly truncated the analysis of manual tasks, with the effect of circumventing the rules governing the analysis of working.

By focusing on manual tasks "in the workplace," the court of appeals converted respondent's manual tasks claim into a working claim. However, in the process of conversion, the court of appeals omitted the requirement that the employee's impairment affect her ability to perform a class or broad range of jobs. The court of appeals' approach does not comply with principles of orderly decisionmaking; it simply enabled the court to find sufficient evidence of disability, based solely on the effects of respondent's impairment on her job performance (and consequent employability), without making the requisite determination whether respondent was excluded from a broad or narrow category of jobs.[8]

II. BY LIMITING ITS ANALYSIS TO THE PERFORMANCE OF WORK-RELATED MANUAL TASKS, THE COURT OF APPEALS FAILED TO UNDERTAKE AN APPROPRIATE ANALYSIS OF ANY PROPERLY DEFINED "MAJOR LIFE ACTIVITY"

The court of appeals' analysis places undue emphasis on the extent to which a disability is manifested in the workplace and affects job performance. In articulating the standard for establishing a substantial limitation on the ability to perform manual tasks, the court of appeals stated that "to be disabled the plaintiff must show that her manual disability involves a 'class' of manual activities *affecting the ability to perform tasks at work*." Pet. App. 4a (emphasis added). The court then concluded that respondent's ability to perform "personal or household chores, does not effect [*sic*] a determination that *her impairment substantially limits her ability to perform the range of manual tasks associated with an*

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[8] The petition for certiorari argues that "'working' and 'performing manual tasks' are indeed distinct inquiries, and that each must be resolved without reference to the other." Pet. 21. The petition further contends that by "evaluat[ing] how an impairment affects a plaintiff's ability to work in order to determine whether that impairment limits the major life activity of performing manual tasks," the court of appeals "improperly fuse[d] two distinct analyses into one." *Ibid.* In our view, the greater defect in the court of appeals' approach is that, in fusing the two inquiries, the court eliminated an important aspect of the working inquiry—namely, the determination whether respondent's impairment had the effect of excluding her from a class or broad range of jobs.

assembly line job." *Ibid.* (emphasis added). The court thus (a) held that an ADA plaintiff who alleges a substantial limitation on the activity of "performing manual tasks" must prove an adverse effect on job performance, and (b) improperly truncated its examination of respondent's "manual tasks" claim by treating the performance of work-related manual tasks as though it were a "major life activity." Both aspects of the court's analysis are erroneous.

A. The statutory definition of "disability" (42 U.S.C. 12102(2)) clearly encompasses impairments that have no effect on job performance. See, *e.g.*, *Bragdon* v. *Abbott*, 524 U.S. 624, 638 (1998) (holding that "[r]eproduction falls well within the phrase 'major life activity,'" and that "[n]othing in the [ADA] definition [of 'disability'] suggests that activities without a public, economic, or daily dimension may somehow be regarded as so unimportant or insignificant as to fall outside the meaning of the word 'major'"); *id.* at 639 ("The inclusion [in the regulations] of activities such as caring for one's self and performing manual tasks belies the suggestion that a task must have a public or economic character in order to be a major life activity for purposes of the ADA."). With the obvious exception of "working," proof that an individual is substantially limited in one of the major life activities identified in the regulations does not require a showing that his impairment affects job performance. In particular, an individual whose impairment substantially limits his ability to perform manual tasks has a "disability" within the meaning of the ADA, even if the tasks that the individual is unable

to perform all occur off the job and the impairment does not affect his "ability to perform tasks at work."[9]

Title I of the ADA generally prohibits employment discrimination "against a qualified individual with a disability because of the disability of such individual." 42 U.S.C. 12112(a). Title I defines the term "qualified individual with a disability" to mean "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. 12111(8). That the definition of "qualified individual with a disability" includes a person who can perform the relevant job "without * * * accommodation" reinforces the conclusion that proof of an effect on job performance is not necessary to establish the existence of a "disability." It would be perverse, moreover, to suggest that an individual who is substantially limited in some other "major life activity" could be deprived of Title I's employment protections on the ground that her performance of work-related functions is *not* impaired. Indeed, a major goal of the ADA is to ensure that disabilities that do not affect a person's actual ability to function in the workplace will

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[9] Respondent's brief in opposition to the petition for certiorari reflects the same misunderstanding as the court of appeals' opinion. Respondent states that "[i]t is appropriate that the impairment claimed always 'affect' or be related to employment because [Title I] of the ADA only relates to employment." Br. in Opp. 9 (citing 42 U.S.C. 12112(a)). That is a non sequitur. It is true that Section 12112(a) applies only to disability-based discrimination in employment, and that "[t]he ADA does not prohibit disability discrimination in social settings." *Ibid.* But the fact that the *discrimination* proscribed by Title I is limited to employment practices does not mean that the *impairment* must have workplace effects in order to constitute a disability.

not be used as a basis for irrationally limiting the employment opportunities of qualified disabled individuals.

B. The requirement that an impairment must substantially limit one or more "major life activities" of an individual is at the heart of the ADA's definition of "disability." See 42 U.S.C. 12102(2)(A). The term "major" indicates that only fundamental activities will qualify, and the activities identified in the applicable EEOC regulation, see 29 C.F.R. 1630.2(i) (defining major life activities to include "functions such as caring for onself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working"), reinforce that reading. In holding that reproduction is a major life activity, this Court noted that "[r]eproduction and the sexual dynamics surrounding it are central to the life process itself." *Bragdon*, 524 U.S. at 638. Although the pertinent EEOC regulation does not purport to provide an exhaustive catalogue of "major life activities," see *id.* at 638-639, the fundamental character of the enumerated activities indicates that courts should proceed with caution in identifying "major life activities" other than those listed in the regulation. In particular, it is inappropriate to define as a "major life activity" a work-related subset (*e.g.*, "hearing" or "seeing" in the workplace) of one of the activities enumerated in the rule.

The performance of work-related manual tasks is a subset of both "performing manual tasks" and "working," but it is not itself defined in the pertinent regulations as a "major life activity." By framing the question before it as whether respondent was substantially limited in performing work-related manual tasks, the court of appeals essentially declined to consider evidence that would have been directly relevant to analysis of a properly defined "major life activity." A proper determination whether a plaintiff is substantially limited in "working" would generally include consideration of his ability (or inability) to carry out jobs that do not significantly entail the performance of manual tasks. And a proper determination whether a plaintiff is substantially limited in "performing manual tasks" would include an assessment of his ability (or inability) to perform manual tasks outside the workplace as well as those on the job.[10] The court of appeals failed to perform either of those analyses.

[10] The court of appeals' truncated analysis of manual tasks is neither pro-employee nor pro-employer; it is simply erroneous. The effect of truncating the "manual tasks" inquiry by focusing only on work-related tasks will likely work to the advantage of some plaintiffs and to the disadvantage of others. On the one hand, an exclusive focus on work-related tasks may cause workplace restrictions to appear more "substantial" by reducing the universe of potential manual tasks, thereby increasing the likelihood that some plaintiffs (particularly those whose impairments manifest themselves most severely on the job) will be found to be disabled. On the other hand, a refusal to consider the individual's inability to perform non-work-related tasks may unfairly deny the protections of the Act to other persons who are fully able to function in the relevant workplace but who are substantially limited in the performance of manual tasks generally.

III. THIS CASE SHOULD BE REMANDED TO ALLOW THE COURT OF APPEALS TO DETERMINE, BASED ON APPROPRIATE LEGAL STANDARDS, WHETHER RESPONDENT HAS PRESENTED SUFFICIENT EVIDENCE THAT SHE IS SUBSTANTIALLY LIMITED IN THE MAJOR LIFE ACTIVITIES OF EITHER "WORKING" OR "PERFORMING MANUAL TASKS"

For the foregoing reasons, this Court should vacate the court of appeals' judgment and remand the case to permit the courts below to determine, under the correct legal standards, whether respondent has adduced evidence sufficient to foreclose summary judgment for petitioner on the question whether respondent is substantially limited in the major life activities of either "working" or "performing manual tasks."[11] The following observations may be relevant to the proceedings on remand:

A. Although an ADA plaintiff cannot establish a substantial limitation on "working" based on exclusion from a particular job or narrow class of jobs, "an individual does not have to be totally unable to work in order to be considered substantially limited in the major life activity of working." 29 C.F.R. Pt. 1630, App. § 1630.2(j); cf. *Bragdon*, 524 U.S. at 641 ("The Act addresses substantial limitations on major life activities, not utter inabilities."). Thus, the fact that respondent can perform some assembly line jobs does not, in and of itself, preclude her from establishing that she is

[11] The courts below can also address on remand respondent's alternative claims that she has a "record" of qualifying impairment, see 42 U.S.C. 12102(2)(B), and that she is "regarded as" disabled, see 42 U.S.C. 12102(2)(C). See notes 2, 3, *supra*.

substantially limited in the "major life activity" of "working."

As we explain above, the court of appeals appeared to decide this case on the assumption that respondent was not excluded from a class of jobs or from a sufficiently broad range of jobs to establish disability based on "working." The court did not squarely resolve that question, however, and it remains open to respondent on remand to challenge the district court's adverse ruling on that point. The government takes no position on the question whether respondent's evidence on that point is sufficient to withstand petitioner's motion for summary judgment.

B. A plaintiff may sometimes be able to establish a "disability" based on an inability to perform, or substantial restrictions on the performance of, a combination of work-related and non-work-related manual tasks. Thus, even if respondent is unable on remand to establish a substantial limitation on the activity of "working," her inability to perform the manual tasks associated with a particular job or narrow category of jobs might still support a claim of disability if respondent can also demonstrate that her impairment substantially limits her ability to perform manual tasks outside the workplace.

The court of appeals briefly alluded to respondent's contention that her impairments affect her ability to perform "manual tasks associated with recreation, household chores and living generally," Pet. App. 6a, but it undertook no meaningful analysis of the record evidence bearing on respondent's ability to perform non-work-related manual tasks. (The court's failure to perform such an analysis may have resulted from its misconception that to demonstrate a substantial limitation on the activity of "performing manual tasks," an

ADA "plaintiff must show that her manual disability involves a 'class' of manual activities affecting the ability to perform tasks at work." *Id.* at 4a; see pp. 18-20, *supra*.) Although the court of appeals' analysis of the "manual tasks" issue was legally flawed, respondent may still be able to prevail on remand under the appropriate legal standards if she can establish a substantial limitation on her ability to perform a combination of work-related and non-work-related manual tasks. The government takes no position on the question whether respondent presented sufficient evidence to withstand petitioner's motion for summary judgment on that point.

CONCLUSION

The judgment of the court of appeals should be vacated, and the case should be remanded to the court of appeals for further consideration under the appropriate legal standards.

Respectfully submitted.

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Toyota Motor Manufacturing, Kentucky, Inc.

Petitioner

vs.

Ella Williams

Respondent

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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National Research Council and the Institute of Medicine (2001) *Musculoskeletal Disorders and the Workplace: Low Back and Upper Extremities*. Panel on Musculoskeletal Disorders and the Workplace. Commission on Behavioral and Social Sciences and Education. Washington DD: National Academy Press..... 24

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Brief Amicus Curiae

This amicus *curiae* brief is submitted in support of the Petitioner Toyota Motor Manufacturing, Kentucky, Inc. By letters filed with the Clerk of the Court, Petitioner and Respondent have consented to the filing of this brief.[1]

Interest of the Amicus Curiae

Levi Strauss & Co. ("LS&CO.") is one of the world's largest brand-name apparel marketers with 1999 sales of $5.14 billion. LS&CO. manufactures and markets branded jeans and casual sportswear under the Levi's®, Dockers®, and Slates® brands. LS&CO. employs approximately 9,300 people in the United States; worldwide, LS&CO. employs 17,000 people.

LS&CO. currently has 21 production facilities and 25 customer service centers throughout the world. LS&CO., headquartered in San Francisco, California, has domestic apparel manufacturing facilities in California, Georgia, Tennessee and Texas, distribution facilities in Arkansas, Kentucky, Mississippi and Nevada, and retail outlets or regional offices in Arizona, California, Illinois, Massachusetts, Michigan, Missouri, New York,

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[1] Counsel for a party did not author this brief in whole or in part. No one, other than the *amicus curiae*, made a monetary contribution to the preparation or submission of this brief. Counsel for the parties have given their written consent for the filing of this amicus curiae brief as required by Rule 37.3(a). Copies of the written consents accompany this brief as required by Rule 37.3(a).

North Carolina, Texas, Virginia, Washington, and Wisconsin.

LS&CO.'s commitment to worker health and safety pre-dates government-mandated programs. In 1998, LS&CO. received the Ron Brown Award for Corporate Leadership, the first Presidential Award to honor companies for outstanding achievements in employee and community relations. The preamble to the Occupational Safety and Health Administration's Ergonomics Program, 65 Fed. Reg. 68261 (Nov. 14, 2000), describes LS&CO. as one of the "workplaces with the best ergonomics programs in place" (65 Fed. Reg. at 68300, col. 3, Tr. 14730) and states that the LS&CO. ergonomics program is one of the "[m]odel programs that contain OSHA's program elements" (65 Fed. Reg. at 68319, col. 2, Tr. 14707; see also 65 Fed. Reg. at 68284, col. 3). Discussion of LS&CO.'s "successful ergonomics ... program" (65 Fed. Reg. at 68306, col. 3; Tr. 14707) is also set forth at 65 Fed. Reg. 68307, col. 3, Tr. 14707; 68310, col. 2, Tr. 14707, 68311, col. 3, and 68313, col. 3, Tr. 14715-16. In this regard, for example, the OSHA ergonomics standard discussed LS&CO.'s use of symptoms of musculoskeletal disorders as one means by which the company evaluates a job for "ergonomic risk factors," with a view toward possible modification of the job to reduce risk prior to the possible occurrence of an injury. 65 Fed. Reg. at 68311, col. 3 – 68312 col. 1.[2]

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[2] The OSHA ergonomics standard was invalidated by Public Law 107-5, 115 Stat. 7 (March 20, 2001). Thereafter, the U.S. Department of Labor decided to hold three public forums in July of 2001 "to discuss possible approaches to addressing ergonomic hazards in the workplace." 66 Fed. Reg. 31694 (Jun. 12, 2001); *see also* 66 Fed. Reg. 33578 (Jun. 22, 2001).

LS&CO.'s products are made by individuals who have the ability to perform repetitive motion, manual tasks. According to the decision of the Sixth Circuit, an individual could be "disabled" under the ADA if the individual experiences "limits on manual activities which can affect other major life activities." *Williams v. Toyota Motor Manufacturing, Kentucky, Inc.*, 224 F.3d 840, 844 (6th Cir. 2000) *cert. granted* ___ U.S. ___, 121 S.Ct 1600 (2001). If upheld, the Sixth Circuit's decision would significantly increase the impact and obligations on almost every employer, including LS&CO., covered by the ADA.

The Sixth Circuit's decision would permit any individual to maintain an ADA claim as long as they could show they are unable to perform "manual tasks associated with working." *Id.* Yet, under the Sixth Circuit's standard, the employee would not have to demonstrate that they are unable to perform a class of jobs or a broad range of jobs in various classes, as would otherwise be required for the employee to establish a substantial limitation of the major life activity of working. LS&CO. believes Congress never intended the ADA would allow employees to maintain claims simply because the employee is limited in being able to perform some of the manual tasks required by their job.

Summary of the Argument

Part I of LS&CO.'s amicus brief will show that the court of appeals definition of "disability" is not only unwarranted – based upon the statutory text as well as the legislative history of the ADA, 42 U.S.C. § 12102(2)(A), and the Rehabilitation Act of 1973, as

amended, 29 U.S.C. § 705(20)),[3] -- but that it is unnecessary, given the other means by which an individual may establish that he or she is entitled to ADA protection.

In Part II of this amicus brief, LS&CO. will describe the medical nature of carpal tunnel syndrome, its typical impact on those individuals who are treated for it and how the syndrome has been addressed in the courts of appeal.

Argument

I

"The ADA seeks to eliminate unwarranted discrimination against disabled individuals in order both to guarantee those individuals equal opportunity and to provide the Nation with the benefit of their consequently increased productivity." *Cleveland v. Policy Management Systems, Inc.*, 526 U.S. 795, 801 (1999) (citing 42 U.S.C. § 12101(a)(8), (9)).[4] During consideration by Congress, the official

[3] The Rehabilitation Act definition of "handicapped individual" has migrated several times. Originally codified at 29 U.S.C. § 706(6), by the time the ADA was enacted it was found at § 706(8), *see* Pub. L. 101-336, § 512, 104 Stat. 327, 376 (§ 512 of the ADA), to its present location (with a name change to "individual with a disability"), 29 U.S.C. § 705(20), accomplished as part of Public Law 105-220, § 403, 112 Stat. 936, 1093; *see also* 29 U.S.C. § 705(9), defining "disability."

[4] The use of the phrase "*unwarranted* discrimination" in *Cleveland* illustrates the difference between the ADA and other anti-discrimination statutes, such as section 8(a) of the National Labor Relations Act, 29 U.S.C. § 158(a), Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3, and the Age Discrimination in Employment Act, 29 U.S.C. § 623(a). While these (and numerous other) statutes prohibit discrimination because of a protected characteristic or activity, the ADA, like

title of the ADA was a bill to establish a "clear and comprehensive prohibition of discrimination on the basis of disability." S. 933, 101st Congress, 1st Session; *cf.* Pub. L. 101-336, 104 Stat. 327. Nine years of litigation under the ADA has shown that Congress was more successful in establishing a "comprehensive prohibition" against disability discrimination than it was in providing a "clear" prescription as to which individuals are entitled to protection under the ADA.[5]

The definition of "disability" has, at least at times, challenged employees, employers and the courts. Petition for Certiorari, p. 15-17, *see, e.g., Williams*, 224 F.3d at 842 ("The ADA is unclear as to when it should be applied to protect an employee. . . ."); *Gelabert-Ladenheim v. American Airlines, Inc.*, ___ F.3d ___, 2001 WL 640175 (1st Cir. 2001) ("lack of predictability is an unfortunate artifact of ADA law").

The ADA contains a three-part definition of "disability:"

the Rehabilitation Act, does not require employers "to disregard the disabilities of handicapped individuals . . . ." *Southeastern Community College v. Davis*, 442 U.S. 397, 405 (1979). Rather, the "mere possession of a handicap is not a permissible ground for assuming an inability to function in a particular context." *Id.*

[5] The Court recently recognized that the "comprehensive national mandate" the ADA calls for refers to the prohibition of "discrimination against disabled individuals in major areas of public life, among them employment (Title I of the Act), public services (Title II), and public accommodations (Title III)." *PGA Tour, Inc. v. Martin*, 532 U.S. ___, 121 S.Ct. 1879, 1889 (2001).

> The term 'disability' means, with respect to an individual—
> (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
> (B) a record of such an impairment; or
> (C) being regarded as having such an impairment.

42 U.S.C. § 12102(2). This definition is virtually identical to the definition of "handicapped individual" in the Rehabilitation Act of 1973, as it was amended in 1974. 29 U.S.C. § 701, *et seq.*

As originally enacted, the Rehabilitation Act of 1973, defined the term "handicapped individual" in the following manner:

> Any individual who (A) has a physical or mental disability which for such individual constitutes or results in a substantial handicap to employment and (B) can reasonably be expected to benefit in terms of employability from vocational rehabilitation services provided pursuant to titles I and II of this Act.

Pub. L. 93-112, § 7(6), 87 Stat. 355.

The Rehabilitation Act Amendments of 1974 added the definition that (with minor changes in terminology and phrasing) came to be adopted by the ADA:

> For purposes of Titles IV and V of this Act, the term "handicapped individual" means

> any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment.

Pub. L. 93-516, § 111(a), 88 Stat. 1617 (amending § 7(6) of the Rehabilitation Act of 1973, codified at 29 U.S.C. § 706(6) (1982)). Congress stated the revised definition was necessary because the existing definition:

> has proven to be troublesome in its application to provisions of the Act such as sections 503 and 504 because of its orientation toward employment and its relation to vocational rehabilitation services.

S. Rep. No. 93-1297 (2nd Sess. 1974); *reprinted in* 1974 U.S.C.C.A.N. 6373, 6388. The Senate Report explained:

> The amended definition eliminates any reference to employment and takes cognizance of the fact that handicapped persons are discriminated against in a number of ways. First, they are discriminated against when they are, in fact, handicapped. . . . Second, they are discriminated against because they are classified or labeled, correctly or incorrectly, as handicapped. . . Third, they are discriminated against if they are regarded as handicapped, regardless of whether they are in fact handicapped. . . .

Clause (A) in the new definition eliminates any reference to employment and makes the definition applicable to the provision of Federally-assisted services and programs. Clause (B) is intended to make clearer that the coverage of sections 503 and 504 extends to persons who have recovered – in whole or in part – from a handicapping condition, such as a mental or neurological illness, a heart attack, or cancer and to persons who were classified as handicapped (for example, as mentally ill or mentally retarded) but who may be discriminated against or otherwise be in need of the protection of sections 503 and 504.

Clause (C) in the new definition clarifies the intention to include those persons who are discriminated against on the basis of handicap, whether or not they are in fact handicapped, just as title VI of the Civil Rights Act of 1964 prohibits discrimination on the ground of race, whether or not the person discriminated against is in fact a member of a racial minority. This subsection includes within the protection of sections 503 and 504 those persons who do not in fact have the condition which they are perceived as having, as well as those persons whose mental or physical condition does not substantially limit their life activities and who thus are not technically within clause (A) in the new definition. Members of both of these groups may be subjected to discrimination on the basis of their being regarded as handicapped.

1974 U.S.C.C.A.N. at 6389-90, *see also id.* at 6413-14, explaining that the definition originally enacted as part of the Rehabilitation Act was:

> far too narrow and constricting when removed from the context of trying to focus on the needs of individuals for vocational rehabilitation services in connection with a vocational goal. Thus, a new definition has been developed which would provide sufficient latitude (but still not be totally open ended). . . .

The Court, in *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987), also explained the purpose of the 1974 amendment:

> The amended definition reflected Congress' concern with protecting the handicapped against discrimination stemming not only from simple prejudice, but also from "archaic attitudes and laws" and from "the fact that the American people are simply unfamiliar with and insensitive to the difficulties confront[ing] individuals with handicaps." S. Rep. No. 93-1297, p. 50 (1974). To combat the effects of erroneous but nevertheless prevalent perceptions about the handicapped, Congress expanded the definition of "handicapped individual" so as to preclude discrimination against "[a] person who has a record of, or is regarded as having, an impairment [but who] may at present have no actual incapacity at all."

Southeastern Community College v. Davis, 442 U.S. 397, 405-406, n. 6 (1979).

* * *

> By amending the definition of "handicapped individual" to include not only those who are actually physically impaired, but also those who are regarded as impaired and who, as a result, are substantially limited in a major life activity, Congress acknowledged that society's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment.

480 U.S. at 284; *accord Sutton v. United Airlines Inc.*, 527 U.S. 471, 489 (1999). The Seventh Circuit, in *Vande Zande v. Wisconsin Dep't of Admin.*, 44 F.3d 538, 541 (7th Cir. 1995), explained that the "regarded as" definition of disability "actually makes a better fit with the elaborate preamble to the Act, in which people who have physical or mental impairments are compared to victims of racial and other invidious discrimination. Many such impairments are not in fact disabling but are believed to be so, and the people having them may be denied employment or otherwise shunned as a consequence." *See* 42 U.S.C. § 12101(a)(7); *Kocsis v. Multi-Care Management, Inc.*, 97 F.3d 876, 884-85 (6th Cir. 1996)

With few modifications,[6] the tri-part definition of handicap in the Rehabilitation Act remained in place and ultimately provided the basis for the definition of "disability" in the Americans with Disabilities Act of 1990.

As the Court recognized in *Sutton*, 527 U.S. at 484, before the 101st Congress enacted the Americans with Disabilities Act of 1990, the 100th Congress took up consideration of the "1988 precursor," the "Americans with Disabilities Act of 1988," S. 2345, 100th Cong. (2nd Sess. 1988); H.R. 4498, 100th Cong. (2nd Sess. 1988) ; *see generally* 134 Cong. Rec. 9,375 (April 28, 1988); 134 Cong. Rec. 9,600 (April 29, 1988)).

The definition of "handicap" in S. 2345 was materially broader than the definition of "disability" in the Americans with Disabilities Act of 1990. Section 3 of S. 2345 defined "handicap" as follows:

> (1) On the Basis of Handicap. – the term "on the basis of handicap" means because of a physical or mental impairment, perceived impairment, or record of impairment.
> (2) Physical or Mental Impairment. -- the term "physical or mental impairment" means –

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[6] *See, e.g.*, Public Law 95-602, § 122(a), 92 Stat. 2955, 2984-85, amending the definition of "handicapped individual" in 29 U.S.C. § 706(6) to exclude an individual who is an "alcoholic or drug abuser whose current use of alcohol or drugs prevents such individual from performing the duties of the job in question or whose employment, by reason of such current alcohol or drug abuse, would constitute a direct threat to property or the safety of others."

(a) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more systems of the body, including the following –

(i) the neurological system;
(ii) the musculoskeletal system;
(iii) the special sense organs, and respiratory organs, including speech organs;
(iv) the cardiovascular system;
(v) the reproductive system;
(vi) the digestive and genitourinary systems;
(vii) the hemic and lymphatic systems;
(viii) the skin; and
(ix) the endocrine system; or

(b) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

(3) perceived impairment. -- the term "perceived impairment" means not having a physical or mental impairment as defined in paragraph (2), but being regarded as having or treated as having a physical or mental impairment.

(4) record of impairment. – the term "record of impairment" means having a history of, or

having been misclassified as having, a physical or mental impairment.

134 Cong. Rec. at 9,379; *see also* 134 Cong. Rec. 9,600 (introduction of H.R. 4498).[7]

S. 2345 would have eliminated the requirement that to have a disability, an individual must have an impairment that "substantially limits one or more of the major life activities of such individual." Instead, any individual who had a "physical or mental impairment" would have been included in the protected class under S. 2345. The distinction between the two definitions was recognized in *Sutton* with the following explanation:

> By its terms, the ADA allows employers to prefer some physical attributes over others and to establish physical criteria. . . . Accordingly, an employer is free to decide that physical characteristics or medical conditions that do not rise to the level of an impairment--such as one's height, build, or singing voice--are preferable to others, *just as it is free to decide that some limiting, but not substantially limiting, impairments make individuals less than ideally suited for a job.*

Sutton, 527 U.S. at 490-91 (emphasis added); *accord Albertson's Inc. v. Kirkingburg*, 527 U.S. 555, 565

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[7] S. 2345 was introduced on April 28, 1988, during the waning days of the 100th Congress (when the vast majority of legislators were preparing for the 1988 Presidential election, political conventions, and their own re-election campaigns). S. 2345 was referred to the Senate Committee on Labor and Human Resources. 134 Cong. Rec. at 9,375.

(1999) ("only impairments causing 'substantial limitat[ions]' in individuals' ability to perform major life activities constitute disabilities.")

There is, in the legislative history of the ADA, no report explaining why the definition in S. 2345 was discarded. It is clear, however, that the members of the 101st Congress were more comfortable with the familiar definition of disability used in the Rehabilitation Act. *See* 42 U.S.C. § 12201(a); *Bragdon v. Abbott*, 524 U.S. 624, 631-32 (1998) (§ 12201(a) "requires us to construe the ADA to grant at least as much protection as provided by the regulations implementing the Rehabilitation Act.").[8]

At least one commentator has implied that the definition in S. 2345 was not intended to be significantly different from the manner in which the drafters of the ADA believed courts would interpret the definition of "disability" contained therein. C. Feldblum, "*Definition Of Disability Under Federal Anti-Discrimination Law: What Happened? Why? And What Can We Do About It?*" 21 Berkeley J. Employment & Lab. L. 91, 92 & 127-28 (2000).

[8] S. Rep. No. 101-116, at 16 (1st Sess. 1989), stated that the term "disability" should be applied in the same manner as the term "individual with handicaps" was used in Rehabilitation Act regulations issued by the Department of Health, Education, and Welfare in 42 Fed. Reg. 22685 (May 4, 1977), and by the Department of Housing and Urban Development pursuant to the Fair Housing Amendments Act of 1988. 54 Fed. Reg. 3232, 3288 (Jan. 23, 1989). (An identical statement appears on page 50 of H. R. Rep. 101-485(II)). The definition of "individual with handicaps" in these regulations is indistinguishable from the Equal Employment Opportunity Commission's definition of "disability" in 29 C.F.R. pt. 1630.

Professor Feldblum asserts that when the ADA was introduced into the 101st Congress:

> Political advocates for people with disabilities in Washington preferred Silverstein's approach [to use the Rehabilitation Act definition] because, as a strategic matter, it seemed smarter to use a definition of disability that had fifteen years of experience behind it, rather than to attempt to convince Congress to adopt a new, untested definition. Moreover, although there had been, as noted above, a few adverse judicial opinions under Section 504 that had rejected coverage for plaintiffs with some impairments, those opinions were the exception, rather than the rule, in litigation under the Rehabilitation Act.

Id. at 128.[9]

Professor Feldblum targets three Rehabilitation Act decisions as "exceptions to the rule:" *Jasany v. United States Postal Service*, 755 F.2d 1244 (6th Cir. 1985); *Forrisi v. Bowen*, 794 F.2d 931 (4th Cir. 1986); and *E.E. Black, Ltd. v. Marshall*, 497 F. Supp. 1088,

[9] Professor Feldblum does not take the position that courts should more broadly interpret the definition of "disability" in the ADA. Rather, Professor Feldblum wrote the article to attempt to explain how "those of us who helped draft the ADA [could have] so completely misread how the courts would apply its definition of disability[.]" Feldblum, 21 Berkeley J. Employment & Lab. L. at 93. Professor Feldblum ultimately proposes that Congress should amend the ADA to, among other things, incorporate the definition set forth in S. 2345. *Id.* at 162.

1099 (D. Haw. 1986).[10] These decisions were not "exceptions to the rule" because they were among the few Rehabilitation Act decisions to have actually considered whether an impairment substantially limited one or more major life activities. *See, e.g., Daley v. Koch*, 892 F.2d 212, 215 (2nd Cir. 1989).[11]

Of course, the Court's decision in *Arline* resolved a significant coverage issue with respect to whether individuals who have contagious diseases were protected by the Rehabilitation Act. But nothing in the above decisions is inconsistent with *Arline* which relied upon the second part of the definition of "handicapped individual" in holding that the employee had a "record" of a substantially limiting impairment and upon the third part of the definition in holding that an individual who has a contagious disease may be "regarded" as having a substantially limiting impairment because of the attitudes of

[10] Professor Feldblum's assertion that these cases are exceptions to the rule appears to rely upon the following research: "A Westlaw online search revealed that from 1980 to 1989, 930 cases were filed under Section 504 of the Rehabilitation Act. Only 22 of those cases cited *E.E. Black*." Feldblum, 21 Berkeley J. Employment & Lab. L. at 113, n. 114.

[11] Other Rehabilitation Act decisions holding that an individual failed to meet the definition of a "handicapped individual" included *Harris v. Adams*, 873 F.2d 929 (6th Cir. 1989) (on-the-job violence and asthma); *Evans v. City of Dallas*, 861 F.2d 846 (5th Cir. 1988) (knee injury); *Santiago v. Temple University*, 739 F.Supp. 974 (E.D.Pa. 1990) (partial vision loss in one eye); *cf. Reynolds v. Brock*, 815 F.2d 571 (9th Cir. 1987) (citing cases holding that epilepsy is a handicap). In many decisions, the issue was not contested. *See, e.g., Stutts v. Freeman*, 694 F.2d 666 (11th Cir. 1983).

others towards the individual with the handicap. 480 U.S. at 281-85.[12]

There are few references in the legislative history of the ADA regarding whether a particular impairment constitutes a disability under the first part of the definition in the Americans with Disabilities Act. There are at least three rational explanations for this. First, it is reasonable to assume Congress was aware of the manner in which the Rehabilitation Act had been interpreted. *Cannon v. University of Chicago*, 441 U.S. 677, 696-98 (1979) ("It is always appropriate to assume that our elected representatives, like other citizens, know the law; in this case, because of their repeated references to Title VI . . . we are especially justified in presuming both that those representatives were aware of the prior interpretation of Title VI. . . ."); *Cf. Bragdon*, 524 U.S. at 631-32. As in *Cannon*, Congress repeatedly referenced the Rehabilitation Act during the consideration of the ADA. If in fact the courts were divided in how they had construed the definition of "disability" (as the commentator suggests) it is unlikely that Congress would have ignored this controversy in all of the seven Senate, House or Conference reports issued during consideration of the ADA.[13]

[12] The Court declined to address the "regarded as" claim in *Bragdon* because the Respondent had not asserted it in the lower courts. 524 U.S. at 658 n.1.

[13] The 101st Congress published the following reports on the ADA: S. Rep. 101-116 (August 30, 1989); H. Rep. 101-485 (parts 1 through 4) (May 15, 1990); Conf. Rep. 101-596 (July 12, 1990); Conf. Rep. 101-558 (June 26, 1990).

Congress' adoption of the "individualized" approach rather than the categorical approach, *cf. Cleveland*, 526 U.S. at 806 (discussing "presumption" method used in SSDI adjudications), is another reason extended discussion of the intended scope of "disability" protection was unnecessary. Congress eschewed any attempt to set forth a comprehensive list of "impairments," much less disabilities. S. Rep. No. 101-116, p. 22 (1st Sess. 1989) (refusing to provide a list of "impairments" but stating that physical characteristics are not impairments). In *Sutton* the Court held that "whether a person has a disability under the ADA is an individualized inquiry." 527 U.S. at 483 (citing *Bragdon*, 524 U.S. at 642); *see id.* at 657 (Rehnquist, C.J., concurring in relevant part); *PGA Tour, Inc. v. Martin*, 532 U.S. ----, 121 S.Ct. 1879, 1896 (2001); *see also* 29 CFR pt. 1630, App. § 1630.2(j). Congress recognized that it was unnecessary to compile even an illustrative list of covered disabilities.[14]

The 101st Congress also emphasized the importance of the third "regarded as" part of the

[14] During the House debate, Rep. Burton expressed a "concern about the entire concept" of the ADA because he believed it would create "900 classes of disabled or handicapped people." 136 Cong. Rec. H4,613.(daily ed. July 20, 1990). In response to this claim, Rep. Bartlett, one of the House members of the conference committee, put together a "frequently asked questions" statement which emphasized that the "ADA does not cover 900 classes of disability. The ADA includes a functional rather than a medical definition of disability. An individual with a disability is one who--has, has a record of, or is regarded as having--a physical or mental impairment that substantially limits a major life activity. (Sec. 3(2) 1) This is the identical definition that has been in disability discrimination law for Federal contractors since 1973." 136 Cong. Rec. H1,920 (daily ed. May 1, 1990).

definition of disability. For example, in discussing the "regarded as" prong, Senate Report 101-116 states:

> Another important goal of the third prong of the [disability] definition is to ensure that persons with medical conditions that are under control, and that therefore do not currently limit major life activities, are not discriminated against on the basis of their medical conditions. For example, individuals with controlled diabetes or epilepsy are often denied jobs for which they are qualified. Such denials are the result of negative attitudes and misinformation."
>
> * * *
>
> A person who is excluded from any activity covered under this Act or is otherwise discriminated against, because of a covered entity's negative attitudes toward that person's impairment is treated as having a disability. Thus, for example, if an employer refuses to hire someone because of a fear of the "negative reactions" of others to the individual, or because of the employer's perception that the applicant has an impairment which prevents that person from working, that person is covered under the third prong of the definition of disability.

Id., at 24 (citing *Arline*, 480 U.S. at 284); *see also* H. R. Rep. No. 101-485(II), at 93 (1990).

In *Arline*, the Court recognized that the Rehabilitation "Act is carefully structured to replace

. . . reflexive reactions to actual or perceived handicaps with actions based on reasoned and medically sound judgments." 480 U.S. at 285. The statutory definition of "disability" is already broad enough to accomplish the goal of prohibiting unwarranted discrimination. Even if an individual is not significantly impaired by an impairment, that individual is still protected if the individual is "regarded as" having a substantially limiting impairment.

In *Arline*, for example, the "prejudiced attitudes or the ignorance of others" was the type of "reflexive reaction" (to a disability) Congress meant to remedy (in the Rehabilitation Act). The Court found the employee had been "regarded as" having a substantially limiting impairment because the adverse employment action had been based upon an unfounded belief that other individuals would react negatively to a teacher who had had a contagious disease.

In contrast, United Airlines' adoption, in *Sutton*, of an uncorrected 20/100 visual acuity hiring criteria for its global airline pilots was not based upon negative reactions of others nor did the hiring criteria preclude the applicants from working in other jobs related to their skills. 527 U.S. at 492-93. In *Murphy v. United Parcel Serv.*, 527 U.S. 516 (1999), the employee's blood pressure rendered him unable to perform his current job as a commercial mechanic for UPS but there was no proof that UPS believed the employee's high blood pressure prevented him from performing other jobs as a mechanic. 527 U.S. at 522.

The Sixth Circuit ostensibly held Respondent, Ella Williams, was disabled because she was substantially limited in the major life activity of performing "manual tasks." The court, however, characterized her impairments as preventing her "from doing the tasks *associated* with *certain types* of manual assembly line jobs, manual product handling jobs and manual building trade jobs (painting, plumbing, roofing, etc.) that require the gripping of tools and repetitive work with hands and arms extended at or above shoulder levels for extended periods of time." *Williams*, 224 F.3d at 843 (emphasis added). Despite holding that the inability to perform manual tasks "seriously reduces her ability to perform the manual tasks that are job-related," *id.* at 844, the court of appeals refused to consider whether plaintiff was substantially limited from "working" saying that it was a major life activity of "last resort." The court of appeals decision unnecessarily burdened the definition of "disability" with its "notion" of a "class . . . based on a more limited concept than 'working,'" in favor of finding that "limits on manual activities which can affect other major life activities" can constitute a disability under the ADA. *Williams*, 224 F.3d at 844.

By construing the first part of the definition of disability to include impairments that "can affect other major life activities," the court of appeals created a "major life activity" consisting of manual tasks related to a particular assembly line job. Under this approach, an individual could be adjudicated "disabled" based upon the idiosyncratic

functions of the job the individual had been attempting to perform. [15]

Resolving the disability issue is daunting enough as it is. Congress never intended for employees or employers to have to guess at whether an individual has a disability. The ADA was meant to provide a "clear . . . prohibition" against disability discrimination. *Supra* p. 5.

II

LS&CO. believes the Court should be provided with an explanation of the nature of carpal tunnel syndrome. According to the National Institute of Health:

> Approximately 1 percent of individuals with carpal tunnel syndrome develop permanent injury. The majority recover completely and can avoid reinjury by changing the way they do repetitive movements, the frequency with which they do the movements, and the

[15] The Sixth Circuit has, in fact, compounded this error in subsequent decisions: *Henderson v. Ardco, Inc.*, 247 F.3d 645, 652 (6th Cir. 2001) (holding that if the employer "perceived [plaintiff] to be *approximately as impaired as Williams*, then [plaintiff] states a valid 'regarded as' claim."); *Kiphart v. Saturn Corporation*, 251 F.3d 573 (6th Cir. 2001) (holding employee's "impairments substantially limited his ability to perform an entire class of manual activities associated with assembly-line and product-handling jobs involving the use of vibrating hand-held power tools and requiring frequent, repetitive twisting, bending, or flexing of the wrists, elbows, or neck.")

> amount of time they rest between periods when they perform the movements.

The National Institute of Neurological Disorders and Stroke, National Institutes of Health, "Carpal Tunnel Syndrome Information Page." http://www.ninds.nih.gov/health_and_medical/disorders/carpal_doc.htm (June 20, 2000)

The National Institute of Health has explained the medical reason for carpal tunnel syndrome:

> Carpal tunnel syndrome is caused by pressure exerted on the median nerve at the wrist. The median nerve supplies sensation to the thumb-side of the palm, and to the thumb, index finger, middle finger, and the thumb-side of the ring finger. It also supplies movement to part of the hand. The nerve enters the hand through a gap formed by the wrist bones (called the carpal bones) and the tough membrane that holds the bones together (the transverse carpal ligament). This gap is called the carpal tunnel. The passageway is rigid, so swelling of any of the tissues in this area can cause compression of the nerve (this is also called entrapment of the nerve).

http://www.nlm.nih.gov/medlineplus/ency/article/000433.htm (May 16, 2001); *see also* 65 Fed. Reg. at 68460.

In January of 2001, the National Academy of Sciences ("NAS") published a study of

"musculoskeletal disorders" ("MSD").[16] Congress directed the NAS to "conduct a study of all the available scientific literature examining the cause-and-effect relationship between repetitive tasks in the workplace and musculoskeletal disorders." H. R. Rep. No. 105-635, at 131-32 (1998).[17] The NAS MSD Study concluded that "although there is a risk of long-term disability in both types of disorder [low back and upper extremities], the majority of individuals return to work within 31 days." NAS MSD Study 31.

Citing a study by a "working group" with the National Institute of Arthritis and Musculoskeletal and Skin Diseases, the NAS MSD Study found that as of 1990, 37.9 million people, or 15 percent of the entire U.S. population, suffered from one or more chronic musculoskeletal disorders. The Arthritis Institute study further found that, due to the demographic shift, i.e., the aging of the "baby boom" generation, approximately 59.4 million people, or 18.4 percent of the population, will have chronic musculoskeletal disorders by the year 2020. NAS MSD Study 39.

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[16] The official title of the study is: National Research Council and the Institute of Medicine (2001) *Musculoskeletal Disorders and the Workplace: Low Back and Upper Extremities.* Panel on Musculoskeletal Disorders and the Workplace. Commission on Behavioral and Social Sciences and Education. Washington DD: National Academy Press. A full text version is available on the Internet at http://www.nap.edu.

[17] Funding for the NAS MSD Study was authorized by H.R. 4274, 105th Cong. (2nd Sess. 1998), ultimately passed as part of Public Law 105-277, *see* H. R. Rep. No. 105-825, at 369 (1998).

Statistics for the upper extremities indicate that annually, 1.87 million people report having carpal tunnel syndrome, while 588,000 report having tendinitis or related syndromes. NAS MSD Study 54.

One of the panel members on the NAS MSD Study, Jeffrey N. Katz, MD, MS, was the principal author of a separate study entitled "Predictors of Outcomes of Carpal Tunnel Release," 44 Arthritis & Rheumatism, 1184 (May 2001), in which he (and his co-authors) analyzed post-operative satisfaction rates for 188 (responding) patients who had had "carpal tunnel release" surgery performed. Katz reported that "[t]wo-thirds of the patients reported being completely or very satisfied with the outcomes of surgery at 6, 18, and 30 months postoperatively." Katz further reported that the "strongest predictors of less favorable outcomes are worse scores on patient-reported measures of upper extremity functional limitation and mental health status, alcohol use, the involvement of an attorney." *Id.* Katz distinguished the "attorney effect" from patients who pursued a claim for workers compensation which, Katz found, "was not associated with significantly worse outcomes unless an attorney was involved." *Id.* at 1191.

Applying the "individualized inquiry" (either expressly or implicitly) the courts of appeals have found that individuals who have carpal tunnel syndrome are not individuals with a "disability." Most of the decisions have considered claims alleging substantial limitations of the major life activity of "working."

In *Gelabert-Ladenheim v. American Airlines, Inc.*, ___ F.3d ___, 2001 WL 640175 (1st Cir. 2001), the First Circuit held that a plaintiff who worked as a gate and ticket agent at the San Juan, Puerto Rico, airport was not an individual with a disability. Even though the plaintiff was unable to lift more than thirty pounds, push or pull more than twenty pounds, sit or stand longer than eight hours, or type more than one to two hours without a break, she failed to provide proof that she was significantly restricted in her ability to perform a class of jobs. The court faulted the plaintiff's evidence because she had only provided "generic evidence of her work restrictions, e.g., no intense typing or heavy lifting, without showing how these restrictions substantially limit her ability to work in the San Juan area given her education, training, skills, abilities, and employment history."

In *Chanda v. Engelhard/ICC*, 234 F.3d 1219 (11th Cir. 2000), the employee's ADA claim failed because his tendinitis only rendered him unable to perform a narrow range of manual tasks that caused pain in his wrist. The employee was able to perform daily activities, including dressing himself, driving, and attending classes or working in a position requiring computer usage.

In *McKay v. Toyota Motor Mfg, U.S.A., Inc.*, 110 F.3d 369, 370 (6th Cir.1997), the Court held that the plaintiff's inability to perform repetitive-motion factory work because of carpal tunnel syndrome was not a significant limitation of the major life activity of working. The court of appeals found that the impairment disqualified the plaintiff from only a narrow range of repetitive-motion positions and not

from working in the broader class of manufacturing jobs.

In *Broussard v. Univ. of Cal. at Berkeley*, 192 F.3d 1252, 1259 (9th Cir. 1999, the Ninth Circuit upheld summary judgment in the employer's favor because the plaintiff who claimed her carpal tunnel syndrome was a disability had merely shown that she was unable to perform the "specialized job of animal technician for the transgenic mice."

In *Gutridge v. Clure,* 153 F.3d 898, 901 (8th Cir.1998), the court of appeals held that a computer service technician who, because of carpal tunnel syndrome, was unable to perform his previous job that involved lifting and moving computers but who was able to work as a computer service technician was not significantly restricted in the major life activity of working. *See also Helfter v. United Parcel Service, Inc.*, 115 F.3d 613 (8th Cir. 1997) (inability to perform sustained repetitive action with either hand and heavy lifting not enough to show issue of fact about substantial limitation in life activity of work); *Wooten v. Farmland Foods*, 58 F.3d 382, 386 (8th Cir.1995) (plaintiff was not substantially limited in major life activity of working where plaintiff was restricted to lifting items weighing less than 20 pounds and from working in cold environment.)

Where carpal tunnel syndrome has been found to be a significant impairment of the major life activity of working, the common factor has been that the symptoms all but precluded the employee from using the employee's hands and the employee, by reason of other social factors, such as education, experience or geographic location, was unable to find work in a

field for which the employee had the necessary training or skills. *See Quint v. A.E. Staley Mfg. Co.*, 172 F.3d 1, 11-12 (1st Cir.1999); *DePaoli v. Abbott Laboratories, Inc.*, 140 F.3d 688, 673 (7th Cir. 1998); *Wellington v. Lyon County Sch. Dist.*, 187 F.3d 1150, 1155 (9th Cir.1999).

Conclusion

A holding in favor of the Respondent in this case would likely require employers to assume an employee is "disabled" when an employee is physically (or even mentally) unable to perform all or part of a job's requirements. This would be true no matter how many other jobs the employee was able to perform. Requiring an employer (and an employee) to have to resolve whether a work-related function, specific to a particular job, is a "subset" of some other major life activity would make the task of deciding whether someone has a disability significantly broader and more complicated than Congress ever intended it to be.

Levi Strauss & Co. believes the court of appeals improperly (and unnecessarily) expanded the definition of "disability" under the Americans with Disabilities Act. For these reasons, Levi Strauss & Co. submits the Court should reverse the decision of the court of appeals.

Respectfully submitted,

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NO. 00-1089

In the Supreme Court of the United States

TOYOTA MOTOR MANUFACTURING, KENTUCKY, INC.,

Petitioner,

v.

ELLA WILLIAMS,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF THE AMERICAN TRUCKING ASSOCIATIONS, INC., THE CHAMBER OF COMMERCE OF THE UNITED STATES, THE ALLIANCE OF AUTOMOBILE MANUFACTURERS, INC., AND THE ASSOCIATION OF INTERNATIONAL AUTOMOBILE MANUFACTURERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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BRIEF OF THE AMERICAN TRUCKING ASSOCIATIONS, INC., THE CHAMBER OF COMMERCE OF THE UNITED STATES, THE ALLIANCE OF AUTOMOBILE MANUFACTURERS, INC., AND THE ASSOCIATION OF INTERNATIONAL AUTOMOBILE MANUFACTURERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICI CURIAE*[1]

The American Trucking Associations, Inc. (ATA) is a trade association of motor carriers, state trucking associations, and national trucking conferences, created to promote and protect the interests of the trucking industry. ATA's membership includes more than 2,300 trucking companies and industry suppliers of equipment and services. Directly and through its affiliated organizations, ATA represents over 30,000 companies and every type and class of motor carrier operation in the United States. ATA regularly advocates the trucking industry's common interests before this Court and other courts.

The Chamber of Commerce of the United States (the Chamber) is the world's largest business federation representing an underlying membership of nearly 3,000,000 businesses and organizations of every size. Chamber members operate in every sector of the economy and transact business in all or nearly all of the United States, as well as in a large number of countries around the world. A central function of

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[1] The parties have consented to the filing of this brief; the written consents have been filed with the Clerk. This brief was not authored in whole or in part by counsel for a party, and no person or entity, other than the *amici curiae*, their members, and their counsel made a monetary contribution to the preparation and submission of this brief.

the Chamber is to represent the interests of its members in important matters before the courts, Congress, and the Executive Branch. To that end, the Chamber has filed *amicus curiae* briefs in numerous cases that have raised issues of vital concern to the nation's business community.

The Alliance of Automobile Manufacturers, Inc. (Alliance) and the Association of International Automobile Manufacturers (AIAM) are non-profit national trade organizations whose member companies are principally engaged in the production and sale of motor vehicles. They include all of the major distributors of motor vehicles in the United States market.[2]

The issues at stake in this case are of direct concern to *amici* and their members. *Amici* strongly support, and are deeply committed to, equality of opportunity for all persons, and believe that discrimination in all forms should be eliminated from the workplace. At the same time, *amici*'s members, as employers of millions of workers, have a large stake in ensuring that the provisions of the Americans With Disabilities Act (ADA) are applied fairly and in a manner consistent with congressional intent.

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[2] The members of the Alliance are BMW Group, DaimlerChrysler Corp., Fiat Auto S.p.A., Ford Motor Co., General Motors Corp., Isuzu Motors America, Inc., Mazda North America Operations, Mitsubishi Motor Sales of America, Inc., Nissan North America, Inc., Porsche Cars North America, Inc., Toyota Motor North America, Inc., Volkswagen of America, Inc., and Volvo Cars of North America.

The members of AIAM are American Honda Motor Co., Inc., American Suzuki Motor Corp., Daewoo Motor Co., Ltd., Hyundai Motor America, Isuzu Motor America, Inc., Mitsubishi Motor Sales of America, Inc., Saab Cars USA, Inc., Subaru of America, Inc., and Toyota Motor Sales USA, Inc.

In ruling that an impairment that causes difficulty only in the performance of particular work-related manual tasks constitutes a disability, the Sixth Circuit has misconstrued the ADA's definition of "disability." At odds with congressional intent, the Sixth Circuit's construction would bring a broad additional segment of the workforce within the protection of the ADA, imposing unwarranted costs on employers while doing little to advance the ADA's goal of increasing opportunities for the severely impaired. *Amici* have strong interests in establishing a fair and workable standard for defining "disability" that encompasses only those persons who are truly limited in a major life activity.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Sixth Circuit found that Ella Williams had a "disability" within the meaning of the ADA because she is unable to perform certain work-related manual tasks that "require the grasping of tools and repetitive work with hands and arms extended at or above shoulder levels for extended periods of time." Pet. App. 4a. The court's ruling that such a narrow restriction of manual function is a "disability" ignores Congress's intent that the ADA protect a limited class of individuals with severely restrictive impairments, and suggests instead that employers must consider accommodation of *all* impairments, however minor. The Sixth Circuit's sweeping and unwarranted expansion of the ADA's protected class should be reversed.

When Congress enacted the ADA, it purposefully limited the protections of the Act to individuals with impairments that "substantially limit[] one or more of the major life activities" of such individuals. By selecting that definition of "disability," Congress focused its legislative efforts on a severely disadvantaged group that previously had been marginalized both socially and economically. Congress had no intention of regulating all employment decisions based on an employee's

physical characteristics; the Act leaves undisturbed the relationship between employers and employees with minor impairments. Limitation of membership in the ADA's protected class was a crucial corollary to the Act's imposition on employers of an affirmative obligation to make jobs accessible to qualified individuals with disabilities where feasible.

The decision below flouts the legislative intent to limit the protected class to persons whose impairments significantly restrict their functioning as compared with average Americans. It is undisputed that Williams can perform many manual tasks, including those necessary to engage in the normal activities of daily living. Her manual impairment restricts her only from performing a specific set of repetitive, job-related tasks – and Williams presented no evidence that this impairment would preclude her from working generally, or even would prevent her from performing a broad class of jobs. Under these circumstances, the court of appeals clearly erred in concluding that Williams' manual impairment constituted a disability. Indeed, the decision below would transform the ADA from a statute that makes limited affirmative demands of employers in order to allow individuals with disabilities to participate fully in the economy into one that requires employers to consider accommodating any impairment that makes an employee or applicant less than ideally suited for a particular job.

ARGUMENT

A. Congress Intended To Extend The Extraordinary Affirmative Obligations Imposed By The ADA Only To The Limited Group Of Persons Having Impairments That Are Substantially Limiting.

1. In enacting the ADA, Congress intended to bring the "discrete and insular minority" of disabled Americans into the mainstream of society and to facilitate their full participation in the economy. 42 U.S.C. § 12101(a)(7). In its statement of findings supporting the adoption of the ADA, Congress emphasized that the disabled, "as a group, occupy an inferior status in our society, and are extremely disadvantaged socially, vocationally, economically, and educationally." *Id.* § 12101(a)(6). According to Congress, discrimination against the disabled "denies people with disabilities the opportunity to compete on an equal basis * * * and costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity." *Id.* § 12101(a)(9). Accordingly, the chief goal of the ADA was "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." *Id.* § 12101(b)(1).

Consistent with its stated goals, Congress limited the ADA's protections to those persons whose exclusion from the economy was the focus of legislative concern. Unlike statutes that prohibit employers from making *any* employment decisions based upon characteristics such as race or gender, the ADA does not forbid all consideration by employers of a worker's physical characteristics, including their impairments. "By its terms, the ADA allows employers to prefer some physical characteristics over others and to establish physical criteria." *Sutton* v. *United Airlines, Inc.*, 527 U.S. 471, 490 (1999). In keeping with the congressional goal of ending discrimination against persons *severely* disadvantaged by their actual or perceived physical or mental deficits, the ADA's protections extend only to persons who have a physical or mental impairment "that substantially limits one or more of the major life activities of such individual." 42 U.S.C. § 12102(2)(A).[3] That definition is intended to limit

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[3] The ADA also applies to individuals who have a record of having such an impairment (*id.* § 12102(2)(B)), or are regarded as having such an impairment (*id.* § 12102(2)(C)). Those parts of the definition of "disability" are not at issue in this case.

the ADA's coverage to "only a limited class of persons – individuals who suffer from impairments significantly more severe than those encountered by the average person in every-day life." *Sweet* v. *Electronic Data Sys., Inc.*, 1996 WL 204471, *4 (S.D.N.Y. Apr. 26, 1996). The Act was not meant to disturb the employment relationship between employers and individuals who do not fall within that protected class.

Thus, Congress did not interfere with the employer's right to make employment decisions based on physical characteristics that are not impairments; under the ADA, "an employer is free to decide that physical characteristics or medical conditions that do not rise to the level of an impairment – such as one's height, build, or singing voice – are preferable to others." *Sutton*, 527 U.S. at 490. Congress also did not interfere with the employer's right to make decisions based on impairments that do not rise to the level of disability; the employer is "free to decide that some limiting, but not *substantially* limiting, impairments make individuals less than ideally suited for a job." *Id.* at 490-491.

Accordingly, without raising any issue under the ADA, an employer may refuse to give a job on an assembly line to a woman of below-average height who is too short to reach the conveyor belt; "normal deviations in height, weight, or strength that are not the result of a physiologic disorder are not impairments." EEOC Directive Transmittal: *Executive Summary of EEOC Compliance Manual Section 902*, at 902-11 (Mar. 14, 1995) (No. 915.002). Without involving the ADA, a park service may employ a hiring standard for guides that excludes a job applicant who can walk ten miles, but not fifteen miles, because of a knee impairment; that impairment "does not substantially limit his ability to walk." *Id.* at 902-17. And an airline may refuse to hire a pilot whose uncorrected vision is 20/200 but who sees well with glasses; although it may prevent her from getting that job, her impairment does not substantially limit her major life activities because, in its corrected state, her impairment allows her to function as well as average Americans. *Sutton*, 527 U.S. at 488.

When it enacted the ADA, therefore, Congress expected that some workers having some physical limitations would continue to negotiate the job market without any help from the ADA. The ADA was intended to intrude upon employment decisions only when they affect individuals whose impairments significantly restrict their ability to function as compared to the average working American. See 29 C.F.R. §1630.2(j)(1)(ii) (defining "substantially limit[ed]" as "[s]ignificantly restricted" in ability as compared to "the average person in the general population").

2. These limitations on the ADA's coverage accord with both the Act's central goal – bringing an historically disadvantaged group into the mainstream of society – and its method of achieving that goal. "Unlike other statutes prohibiting discrimination in employment, the ADA requires more than just equal treatment." L. Goddard, *Searching for Balance in the ADA: Recent Developments in the Legal and Practical Issues of Reasonable Accommodation*, 35 IDAHO L. REV. 227, 230 (1999) (footnote omitted). "In recognition of the fact that equal treatment does not lead to inclusion in the mainstream for many people with disabilities" (B. Tucker, *The ADA's Revolving Door: Inherent Flaws In the Civil Rights Paradigm*, 62 OHIO ST. L. J. 35, 344 (2001)), the ADA also requires employers to take *affirmative* steps to make jobs accessible to individuals with disabilities. Congress imposed these significant affirmative obligations on employers only because the expected benefit – the integration of a previously excluded group into the economy – was so substantial.

The most significant duty that the ADA imposes on employers is the obligation to provide "reasonable accommodations" to workers with disabilities. The ADA defines unlaw-

ful discrimination to include "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless * * * the accommodation would impose an undue hardship on" the employer. 42 U.S.C. § 12112(b)(5)(A). The statute also makes it unlawful to deny a job opportunity to an applicant or employee because of the need "to make reasonable accommodation to the physical or mental impairments of the employee or applicant." *Id.* § 12112(b)(5)(B).

Congress anticipated that the very process of determining whether a reasonable accommodation is available can be a significant burden. The House Report explained that, when making employment decisions about a person with a disability, the employer would have to "determine whether a reasonable accommodation would enable the person with the disability to perform the essential functions of the job without imposing an undue hardship on the business." H.R. Rep. No. 101-485(II), 101st Cong., 2 Sess., at 62 (1990). This decision, it was expected, would be made "on the particular facts of the individual case." *Ibid.* Congress recommended that "[a] problem-solving approach * * * be used to identify the particular tasks or aspects of the work environment that limit performance and to identify possible accommodations that will result in a meaningful equal opportunity for the individual with a disability." S. Rep. No. 101-116, 101st Cong., 1st Sess., at 34 (1989).

Congress clearly understood, moreover, that the assessment of whether accommodation is possible would not always be easy. "[W]hen the appropriate accommodation is not obvious" because a job applicant is not familiar with the details of the job and the employer is not familiar with the applicant's disability, the House Report suggests that the employer "consider four informal steps to identify and provide an appropriate accommodation" (H. R. Rep. No. 101-485(II), at 66), including:

- "identify[ing] the abilities and limitations of the individual" and "identify[ing] job tasks or work environment that limit the individual's effectiveness or prevent performance";
- "identify[ing] possible accommodations" by consulting with the individual and with appropriate agencies;
- "assess[ing] the reasonableness of each [possible accommodation] in terms of effectiveness and equal opportunity";
- and "implement[ing] the accommodation that is most appropriate for the employee and the employer."

Ibid. See also S. Rep. No. 101-116, at 34 (same). See generally H. Cominsky, *Guidelines for Successfully Engaging in the Interactive Process to Find a Reasonable Accommodation Under the Americans with Disabilities Act*, 13 LABOR LAWYER 499 (Winter/Spring 1998) (describing process of selecting a reasonable accommodation).

To be sure, an employer may decline to provide an accommodation if doing so would create an "undue hardship," but establishing that defense is neither straightforward nor certain. According to the EEOC, "[g]eneralized conclusions will not suffice to support a claim of undue hardship." EEOC Notice: *Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act*, at 54 (Mar. 1, 1999) (No. 915.002). "Instead, undue hardship must be based on an individualized assessment of current circumstances that show that a specific reasonable accommodation would cause significant difficulty or expense." *Ibid.* This individualized assessment must take into account a list of factors set forth in the statute and regulations, including "the nature and cost of the accommodation needed" and "the overall financial resources of the covered

entity." 42 U.S.C. § 12111(10)(B)(i)-(iii); see also 29 C.F.R. 1630.2(p). If a court later decides that the employer's analysis was wrong – and that the accommodation should have been provided – the employer may be liable to the employee for damages.

3. Because of the extraordinary affirmative obligations imposed on employers when dealing with persons with disabilities, deciding who is covered by the statute is of crucial importance. As two commentators recently observed, "[t]he definition of disability is the ballgame." S. Issacharoff & J. Nelson, *Discrimination with a Difference: Can Employment Discrimination Law Accommodate the Americans with Disabilities Act?*, 79 N.C. L. REV. 307, 332 (2001). The threshold determination of whether an individual is disabled is crucial in two respects.

First, as explained above, the classification of an applicant or employee as disabled transforms that person's relationship to the employer. If a non-disabled employee is not ideally suited to perform a particular job, the employer is free to give the job to another person who, in the employer's view, better "fits" the job. In contrast, when dealing with an individual with a disability, the employer may have to consider modifying non-essential job functions to enable that individual to perform the job – in effect, changing the job to "fit" the employee. The breadth of the definition of "disability" thus determines how sweeping a change the ADA will make in the American workplace – and how much or little of the employers' freedom to hire and fire at will be preserved.

Defining "disability" properly also is critically important in keeping the lid on ADA litigation. Taking seriously the threshold determination of who is disabled is the best way to avoid protracted litigation over non-meritorious claims, because the existence of a disability is often capable of resolution by summary judgment. See, *e.g.*, *Williams* v. *Channel Master Satellite Sys., Inc.*, 101 F.3d 346, 349 (4th Cir. 1996)

(holding "as a matter of law" that a 25-pound restriction on lifting does not constitute a disability). "[O]nce a person is deemed disabled," however, "the parties then must litigate at substantial cost the issues of reasonable accommodation, business necessity, and qualification standards." Issacharoff & Nelson, *supra*, 79 N.C. L. REV. at 318 (footnotes omitted). Thus, "allowing cases to proceed to the reasonable accommodation inquiry pushes inexorably toward the fact-intensive case-by-case analysis" (*id.* at 337) that cannot easily be resolved on motion for summary judgment. See, *e.g.*, *Equal Employment Opportunity Comm'n* v. *United Parcel Serv., Inc.*, 249 F.3d 557 (6th Cir. 2001) (per curiam) (summary judgment inappropriate on claim that employer failed to offer reasonable accommodation for employee's severe allergies); *Feliberty* v. *Kemper Corp.*, 98 F.3d 274 (7th Cir. 1996) (employer was not entitled to summary judgment on reasonable accommodation merely because it had provided the employee's requested accommodation). Furthermore, once a plaintiff has demonstrated the existence of an accommodation that would allow him or her to perform the job, the employer must meet a significant burden to persuade the fact-finder that providing the accommodation would be an undue hardship. See Goddard, *supra*, 35 IDAHO L. REV. at 242-246 (discussing cases defining employer's burden in establishing undue hardship).

B. The Sixth Circuit's Holding That Difficulty In Performing Manual Tasks Associated With A Particular Job Substantially Limits A Major Life Activity Would Effect A Sweeping Expansion Of The ADA's Coverage That Is Inconsistent With Congressional Intent.

The Sixth Circuit ruled that a plaintiff can establish the existence of a disability by demonstrating that he or she has difficulty performing the manual tasks associated with certain jobs. That ruling flouts the congressional intention to

limit the coverage of the ADA to persons with severely limiting impairments, would transform the employment relationship by making the employer modify its workplace to accommodate virtually all of the physical idiosyncracies of its workers, and would open the floodgates to future litigation under the ADA. Not surprisingly, the decision is at odds both with this Court's prior decisions and those of many Courts of Appeals. The Sixth Circuit's misguided decision should be forcefully rejected.

1. As described by the majority opinion, the issue in this case was "whether plaintiff's physical difficulties in using her hands, arms and shoulders, as required by her new job within paint inspection, constitute a 'disability.'" Pet. App. 2a-3a. The court considered only whether Williams was substantially limited in the major life activity of "performing manual tasks." *Id.* at 4a. According to the Sixth Circuit, the plaintiff could establish the existence of a disability by demonstrating an impairment causing difficulty in "a 'class' of manual activities affecting the ability to perform tasks at work." *Ibid.*

The court of appeals acknowledged that Williams can perform "a range of isolated, non-repetitive manual tasks performed over a short period of time" – including "tending to her personal hygiene or carrying out personal or household chores." *Ibid.* As the dissent pointed out, moreover:

> [T]he record evidence shows that Williams can perform many manual tasks, beginning, most obviously, with the wiping task that she had already been doing prior to her newest assignment. In addition, the record shows that she can perform the manual tasks of brushing her teeth, laundering her clothes, and doing some driving.

Pet. App. 9a. Nevertheless, the majority ruled that Williams "crosses the threshold into the protected class of individuals under the ADA" because her impairments "prevent her from

doing the tasks associated with certain types of manual assembly jobs, manual product handling jobs and manual building trade jobs (painting, plumbing, roofing, etc.) that require the gripping of tools and repetitive work with hands and arms extended at or above shoulder levels for extended periods of time." *Id.* at 4a. In other words, although Williams could perform a broad range of manual tasks, the court found her disabled because she was unable to perform certain manual tasks associated with specific jobs.

As explained above, the ADA's definition of "disability" is intended as a gatekeeper; it identifies the *limited* set of individuals who fall within the protected class and thus are entitled to the accommodation they need in order to perform a particular job. By finding Williams to be disabled *because* she is unable to perform the manual tasks required for a specific job, the Sixth Circuit turned the definition of disability on its head. Under the court of appeals' circular reasoning, the need for an accommodation itself creates the entitlement to one. And that approach, rather than ensuring the continued vitality of the ADA's gatekeeper, opens the floodgates.

2. The Sixth Circuit's decision cannot be squared with Congressional intent, as discerned by this Court and many lower courts. First, as discussed above, Congress made it clear that not just *any* impairment qualifies as a disability; only persons having impairments that "substantially limit" the performance of a major life activity are covered by the ADA. Even non-trivial impairments do not count as disabilities if the affected individual "can perform the normal activities of daily living." *Ray* v. *Glidden Co.*, 85 F.3d 227, 229 (5th Cir. 1996) (impairment causing restriction on repetitive heavy lifting not a disability); see also, *e.g.*, *Kelly* v. *Drexel Univ.*, 94 F.3d 102, 108 (3d Cir. 1996) (hip impairment causing plaintiff to limp and experience pain was not a substantial limitation on the major life activity of walking); *Sweet*, 1996 WL 204471, at *1, *6 (although plaintiff's vision dysfunction "has affected his daily life," it was not a disability be-

cause "[v]ision problems * * * are commonplace"). Thus, under the ADA, the employer remains "free to decide" that such impairments "make individuals less than ideally suited for a job." *Sutton*, 527 U.S. at 490-491. More significantly in this case, the employer has no statutory obligation to make jobs accessible to persons with such non-disabling impairments.

Against this backdrop, it is plain that Williams is not substantially limited in performing manual tasks. She can perform "a range" of manual tasks: she can "tend[] to her personal hygiene [and] carry[] out personal [and] household chores" (Pet. App. 4a), and she even can perform *some* assembly line jobs at the Toyota plant (*id.* at 9a). Indeed, it appears that the *only* manual tasks that Williams *cannot* perform are those that involve "the gripping of tools and repetitive work with hands and arms extended at or above shoulder levels for extended periods of time" – tasks which she had no occasion to perform *except* at certain jobs at Toyota's plant. *Id.* at 4a. Because Williams thus can perform the manual tasks necessary to accomplish "the normal activities of daily living" (*Ray*, 85 F.3d at 229), she is not substantially restricted in that major life activity.

Put another way, Congress did not intend that difficulty performing tasks of a kind that most Americans never have occasion to perform would trigger the ADA's protections. No other conclusion comports with the ADA's purpose of helping persons substantially less functional than most Americans, while minimizing its general intrusion into the employment relationship.

Second, and relatedly, Congress did not intend to confer protected status on individuals whose impairments merely make them unable to perform a particular job. In enacting the ADA, Congress did not aim to ensure equal access to all jobs or to provide redress for the "isolated mismatch of employer and employee." *Forrisi* v. *Bowen*, 794 F.2d 931, 935 (4th

Cir. 1986) (interpreting the Rehabilitation Act); see also *Welsh* v. *City of Okla.*, 977 F.2d 1415, 1417 (10th Cir. 1992) (interpreting the Rehabilitation Act) (major life activity of working "does not necessarily mean working at the job of one's choice"). Legislative efforts instead were focused on persons who, without statutory protection, might be largely if not entirely foreclosed from the job market. See, *e.g.*, S. Rep. No. 101-116, at 9 (explaining that "[t]wo-thirds of all disabled Americans * * * are not working at all," yet "say that they want to work"). Thus, many courts have ruled that individuals with impairments that render them unfit for *some* jobs are not thereby admitted into the ADA's protected class. See, *e.g.*, *Gelabert-Ladenheim* v. *American Airlines, Inc.*, _ F.3d _, 2001 WL 640175 (1st Cir. June 12, 2001) (plaintiff whose carpel tunnel syndrome imposed a 20% impairment on both hands that rendered her unable to lift more than twenty pounds, push or pull more than twenty pounds, sit or stand longer than eight hours, or type more than one to two hours without a break, and caused her some pain and difficulty in performing her daily activities and household chores was not disabled); *Williams*, 101 F.3d at 349 (25-pound lifting restriction was not a substantial limitation on a major life activity, "particularly when compared to an average person's abilities"); *Aucutt* v. *Six Flags Over Mid-America, Inc.*, 85 F.3d 1311, 1319 (8th Cir. 1996) (25-pound lifting restriction stemming from heart condition did not substantially impair plaintiff's ability to work); *Ray*, 85 F.3d at 229 (impairment that prevented repetitious lifting of containers did not substantially limit major life activity of working); *Dutcher* v. *Ingalls Shipbuilding*, 53 F.3d 723, 727 (5th Cir. 1995) (arm impairment that prevented plaintiff from climbing was not a substantial limitation of a major life activity of working); *Jasany* v. *United States Postal Serv.*, 755 F.2d 1244, 1250 (6th Cir. 1985) (postal worker whose strabismus (crossed eyes) made it difficult for him to operate mail sorting machine was not disabled under the Rehabilitation Act).

Indeed, the agency charged with enforcing the ADA considers impairments that substantially affect *only* work-related activities to constitute disability only in limited circumstances. As this Court recognized in *Sutton*, under EEOC guidelines, "[t]o be substantially limited in the major life activity of working, * * * one must be precluded from more than one type of job, a specialized job, or a particular job of choice." 527 U.S. at 492.[4] According to the regulations, with respect to the major life activity of working, the term "substantially limits" means "significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills, and abilities." 29 C.F.R. § 1630.2(j)(3)(i). These regulations attempt to respect the congressional expectation that physical disqualification from some jobs does not automatically trigger the ADA.

Because her limitations manifest themselves meaningfully *only* in the performance of her job, Williams' most plausible claim would appear to be that she is substantially limited in the major life activity of working. Indeed, in most ADA cases involving carpel tunnel syndrome, the battle over whether the plaintiff has a disability is fought on that front. See, *e.g.*, *Gelabert-Ladenheim*, 2001 WL 640175, at *4; see generally K. Small, *The Americans with Disabilities Act: Are Your Wrists Protected?*, 23 J. CORP. L. 325, 335-340 (Winter 1998). This is likely because the syndrome cannot ordinarily be shown to restrict any other "major life activity." Here, Williams did not present the evidence needed to support a "working" claim; and the court of appeals seemed loath to confront the issue, which it called a "difficult concept." Pet. App. 5a.

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[4] In *Sutton*, this Court assumed without deciding that working is a major life activity. *Ibid.*

By finding Williams significantly restricted in performing manual tasks merely because she has difficulty with certain tasks associated with particular jobs, however, the court has simply done an end-run around the requirements for demonstrating substantial limitation in working. Nothing about Williams' case suggests that she had anything other than a run-of-the-mill "working" claim, yet she failed to present evidence demonstrating significant restriction, as compared with the average person, as to a broad class of jobs. Williams should not be allowed to avoid the consequences of that failure simply by bootstrapping her insubstantial work-related restrictions into a substantial limitation in the different life activity of performing manual tasks.

3. If allowed to stand, the Sixth Circuit's overly broad construction of the ADA's definition of "disability" will have significant consequences for employers that Congress did not intend. Most fundamentally, when faced with an employee or job applicant who contends that he or she needs an accommodation to perform a job, it will be far more difficult for an employer to conclude that the employee or applicant is not protected by the ADA. Until the Sixth Circuit's ruling, an individual seeking an accommodation was required to demonstrate to the employer the existence of an impairment that substantially limits him or her *independently* of the job at issue. See, *e.g.*, *Taylor* v. *Pathmark Stores, Inc.*, 177 F.3d 180, 186-187 (3d Cir. 1999) (individual who "can carry out most regular activities that require standing and walking, even though he may not be able to perform Pathmark's jobs without accommodation," was not disabled). Under the decision below, however, an employee or applicant may claim entitlement to an accommodation when he or she has difficulty performing *only* the job that he or she wants. This would transform the ADA from a statute that makes limited affirmative demands of employers to achieve the laudable goal of integrating the disabled into the labor market into one that requires accommodation by the employer of all impairments.

An example may suffice to demonstrate the unwarranted costs that this regime might impose on employers. Imagine that a worker applies and is hired for an assembly line job that requires rotation among four tasks. After a week on the job, the worker discovers that two of the four tasks aggravate an old football injury and cause pain and inflammation in his shoulder. After obtaining confirmation from a doctor that the shoulder impairment (although previously irrelevant to the worker's life) is permanent, the worker requests that the employer modify the rotation system to allow him to perform only two of the tasks. Under the employer's previous understanding of the ADA, that request could be refused without further analysis: a worker is not disabled merely because he or she cannot perform a particular job. Under the decision below, however, the worker might well have an argument that he is substantially limited in performing manual tasks. The employer would thus have to engage in the laborious process of deciding whether the requested accommodation was "reasonable" and/or would impose "undue hardship" – and also would have to attempt to predict whether a court would agree with the employer's analysis.

Modifying the hypothetical slightly makes the intrusion into the employment relationship even more clear. Suppose that a job *applicant* knew that her minor shoulder impairment would permit her to perform only two of the four tasks involved in an assembly line job. Under the Sixth's Circuit's construction of the ADA, the applicant might be deemed to have a "disability," and the prospective employer would be faced with having to decide whether declining to hire her, and instead hiring workers who could easily perform all four tasks, would be deemed discrimination under the ADA.[5]

---

[5] Employers in other industries would face the same dilemma. For example, a trucking company might face a request for accommodation from a driver with arthritis who could easily handle deliveries over relatively short distances, but whose impairment makes it difficult for him to grip a steering wheel during long-haul trips without special equipment or rest periods. Under the Sixth Circuit's definition, the driver's difficulties in performing the manual tasks specific to long-distance trucking might be deemed a "disability."

Inevitably, therefore, adoption of the Sixth Circuit's approach would shift the balance in the workplace toward requiring more accommodation of relatively minor impairments. This transformation would not come without cost. For instance, the employer in the above hypothetical examples, seeking to avoid litigation, might simply decide to end or limit the system of worker rotation among tasks. But that system may have had value both to the employer and to employees – allowing workers to avoid boredom, maximize their skills, and vary their tasks to avoid new repetitive stress injuries, while giving employers the benefits of a well-trained and flexible workforce. And the compensating benefits of eliminating that useful system may not be very significant; the workers whose impairments were accommodated might well have found other jobs, more suited to them physically, without serious difficulty.

The Sixth Circuit's approach also may weaken the incentives for self-selection that currently minimize the ADA's intrusion into the workplace. Because the ADA does not assist individuals with impairments that prevent them from performing only a narrow category of jobs, workers with such impairments must focus their efforts on training for and obtaining jobs in which their impairments do not disadvantage them. Under the Sixth Circuit's interpretation, however, workers would not be discouraged from actively seeking jobs for which they were particularly *ill*-suited, because any physical problems impairing their performance of work-related tasks would likely trigger the ADA.

The decision below thus threatens to transform the ADA from a statute that protects a "discrete and insular minority" of severely impaired individuals to one that requires accommodation of all impairments. It is contrary to the intent of Congress and should be reversed.

CONCLUSION

The judgment of the Sixth Circuit should be reversed.

Respectfully submitted.

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No. 00-1089

IN THE

Supreme Court of the United States

TOYOTA MOTOR MANUFACTURING, KENTUCKY, INC.,

Petitioner,

v.

ELLA WILLIAMS,

Respondent.

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On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF *AMICI CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL AND THE NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF PETITIONER

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On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF *AMICI CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL AND THE NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF PETITIONER

The Equal Employment Advisory Council and the National Association of Manufacturers respectfully submit this brief as *amici curiae*.[1] Letters of consent from all parties have been filed with the Court. The brief urges this Court to reverse the decision below, and thus supports the position of the petitioner, Toyota Motor Manufacturing, Kentucky, Inc.

[1] Counsel for *amici curiae* authored the brief in its entirety. No person or entity, other than the *amici*, their members, or their counsel, made a monetary contribution to the preparation or submission of the brief.

INTEREST OF THE *AMICI CURIAE*

The Equal Employment Advisory Council ("EEAC" or the "Council") is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of employment discrimination. Its membership includes over 350 of the nation's largest private sector corporations, collectively employing over 17 million people throughout the United States. EEAC's directors and officers include many of industry's leading experts in the field of equal employment opportunity. Their combined experience gives the Council a unique depth of understanding of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

The National Association of Manufacturers ("NAM") is the nation's largest multi-industry trade association. NAM represents 14,000 member companies (including 10,000 small and mid-sized manufacturers) and 350 member associations serving manufacturers and employees in every industrial sector and all 50 states.

All of EEAC's and NAM's members are employers subject to the Americans with Disabilities Act (ADA), 42 U.S.C. § 12101 *et seq.*, and other equal employment statutes and regulations. As employers, and as potential defendants to claims asserted under these laws, EEAC's and NAM's members have a substantial interest in the issue presented in this case, *i.e.*, whether an individual whose impairment affects her ability to perform only a subset of manual tasks associated with her job is substantially limited in the major life activity of performing manual tasks so as to have a "disability" under the ADA.

EEAC and NAM seek to assist this Court by highlighting the impact its decision may have beyond the immediate concerns of the parties to the case. Accordingly, this brief brings to the attention of this Court relevant matter that the parties have not raised. Because of their experience in these matters, EEAC and NAM are well situated to brief this Court on the concerns of the business community and the significance of this case to employers.

STATEMENT OF THE CASE

Ella Williams sued her former employer Toyota Motor Manufacturing, Kentucky, Inc. (Toyota), alleging Toyota failed to accommodate her disability and fired her in violation of the Americans with Disabilities Act (ADA), 42 U.S.C. § 12101 *et seq.*[2] Williams worked on an assembly line at one of Toyota's automobile assembly plants. Her job included three duties—inspecting cars for defective paint, manually wiping down newly painted cars, and wiping down passing cars with a highlight oil. This last task required Williams to grip a block of wood with a sponge on the end while keeping her hands and arms raised at shoulder height for several hours. Williams alleges this position exacerbated her ligament and muscle problems, resulting in carpal tunnel syndrome and tendonitis affecting her hands, arms, shoulders and neck. Pet. App. 2a. Williams claims Toyota refused to remove this last duty from her job. Toyota denies this allegation.

The district court concluded that Williams did not have a "disability" under the ADA and granted summary judgment in favor of Toyota on this claim. On appeal, the Sixth Circuit reversed, holding that Williams' inability to perform certain

---

[2] She also claimed Toyota denied her leave and reinstatement rights in violation of the Family and Medical Leave Act (FMLA). The district court granted summary judgment in favor of Toyota on this claim and the Sixth Circuit affirmed.

specific manual tasks associated with her assembly line job was sufficient to allow a fact finder to conclude that her condition substantially limited her in the major life activity of performing manual tasks and thus, that she was an individual with a disability protected by the ADA. According to the Sixth Circuit, Williams' ability to carry out a range of isolated, non-repetitive manual tasks that were not associated with her work, such as tending to her personal hygiene and carrying out personal or household chores, did not alter this conclusion. Pet. App. 4a. The appellate court then held that a factual issue existed on whether Toyota had failed to accommodate Williams' condition.

Judge Boggs wrote a separate opinion concurring in part and dissenting in part in the opinion. With respect to Williams' ADA claim, Judge Boggs disagreed with the court's decision and criticized the majority for "conflat[ing] (and erod[ing]) the standards for demonstrating a substantial limitation on 'working' and on 'performing manual tasks.'" Pet. App. 11a. According to him, the majority erred in reducing the test for determining whether an individual is substantially limited in performing manual tasks to looking at the individual's ability to perform only a subset of them—certain manual tasks required by her job.

This Court granted certiorari to address the issue of whether an impairment that prevents an individual from performing only a limited number of manual tasks associated with her work qualifies as a disability under the ADA.

SUMMARY OF ARGUMENT

The ADA does not cover an individual who is limited in performing only a subset of actions associated with a major life activity. Instead, the language of the ADA is clear that the statute protects a "discrete and insular minority" of 43 million substantially limited individuals. 42 U.S.C. § 12101(a)(7) and (a)(1). The legislative history also shows

that Congress intended the reach of the ADA to remain narrow. Loosening the test to determine whether an individual has a disability, as this case would require, would compromise the goals of the ADA and create unintended hardships for both employers and employees.

The Sixth Circuit impermissibly circumvented the standard for determining when an impairment constitutes a disability by requiring a limitation in only a subset of manual tasks. Unless this Court reverses the decision below, the Sixth Circuit's opinion will permit plaintiffs to do an end-run around the statutory requirement that an individual's ability to perform a major life activity be substantially limited before gaining the protection of the ADA.

Moreover, this Court should reject the Equal Employment Opportunity Commission's (EEOC) improper definition of "major life activities" to include working. Congress did not give the agency authority to issue such a regulation. This Court already has questioned the inclusion of "working" as circular. The lack of clear and consistent standards on when an individual is substantially limited in working also violates the ADA's mandate to provide "clear, strong, consistent, enforceable standards" to address discrimination. In addition, "working" is not intrinsically central enough to life to constitute a major activity under the ADA.

ARGUMENT

I. THE ADA DOES NOT COVER AN INDIVIDUAL WHO IS LIMITED IN PERFORMING ONLY A SUBSET OF ACTIONS ASSOCIATED WITH A MAJOR LIFE ACTIVITY

A. The ADA Protects a "Discrete and Insular Minority" of 43 Million Substantially Limited Individuals

The threshold requirement for coverage under the Americans with Disabilities Act (ADA), 42 U.S.C. § 12101 *et seq.*, is that the plaintiff be an "individual with a disability." The law defines that term as follows:

> The term "disability" means, with respect to an individual—
>
> (A) a physical or mental impairment that *substantially limits one or more of the major life activities* of such individual;
>
> (B) a record of such an impairment; or
>
> (C) being regarded as having such an impairment.

42 U.S.C. § 12102(2) (emphasis added).

The language of the ADA states unequivocally that Congress intended to protect from discrimination a narrow group of individuals with disabilities—persons whose serious physical and mental impairments prevent them from functioning at the level of the average person in at least one major life activity. The very first legislative finding in the ADA is that "some 43,000,000 Americans have one or more physical or mental disabilities." 42 U.S.C. § 12101(a)(1). This Court recognized in *Sutton v. United Airlines, Inc.*, 527 U.S. 471, 484 (1999), that this relatively small number shows that Congress and the President intended the ADA to improve the circumstances of a limited group of significantly impaired

people. Had Congress intended the scope of the ADA's protection to be larger, it would have cited a much higher number of protected individuals. *Id.*

Additional language in the findings confirms the narrow scope of the protected class. As Justice Ginsburg points out in her concurring opinion in *Sutton*, Congress described the protected class selectively as "a discrete and insular minority," who have been faced with restrictions and limitations, "subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, § 12101(a)(7)." *Id.* at 494 (internal quotations omitted). Like the majority, Justice Ginsburg concluded that "Congress's use of the phrase [discrete and insular minority] is a telling indication of its intent to restrict the ADA's coverage to a confined, and historically disadvantaged, class." *Id.* at 495.

These legislative findings convinced this Court in *Sutton* that the ADA was never intended to cover individuals with correctable disabilities, since to do so would greatly expand the Act's coverage beyond the intended protected class of 43 million people. 527 U.S. at 484. The same logic applies here.

B. The Legislative History Shows That Congress Intended the Reach of the ADA To Remain Narrow

The legislative history of the ADA also provides strong support for interpreting the Act's protection to extend only to a limited group. As the House Committee on Education and Labor Report explains, "[a] person is considered an individual with a disability for purposes of the first prong of the definition when the individual's important life activities are restricted as to the conditions, manner, or duration under which they can be performed in comparison to most people." H.R. Rep. No. 101-485, pt. 2, at 52 (1990), *reprinted in* 1990

U.S.C.C.A.N. 303, 334; S. Rep. No. 101-116, at 23 (1989). Once again, Congress utilized language showing that it intended to protect individuals who are restricted as compared to the significant majority who are not.

Congress' own description of those who stand to benefit under the ADA provides further evidence of the limited scope of the protected class. Like the text of the ADA, the Senate Committee on Labor and Human Resources Report identifies 43 million individuals who "will be entitled to the protections of this legislation as employees, job applicants, clients and customers of places of public accommodation, and *users of telephone services*." S. Rep. No. 101-116, at 88 (1989) (emphasis added). Of that number, the Senate Committee identified approximately 24 million hearing impaired and 2.75 million speech impaired persons in the country who would benefit from the increased availability of telecommunications services as a result of the legislation. [3] *Id.* at 88-89. The sum of almost 27 million individuals with hearing and speech impairments that Congress intended the ADA to help leaves only 16 million individuals in the country with other physical or mental impairments so severe that they would qualify as disabled. The small size of this residual group strongly indicates that it cannot include individuals with impairments affecting only a subset of tasks associated with a major life activity. *See Sutton*, 119 S. Ct. at 2149 (noting that "the number of people with vision impairments alone is 100 million").

[3] This benefit refers to Title IV of the legislation, which amended Title II of the Communications Act of 1934 to require telephone common carriers to provide adequate telecommunications services to hearing and speech impaired individuals to enable them to communicate effectively with hearing individuals.

C. Loosening the Test to Determine Whether an Individual Has a Disability Would Compromise the Goals of the ADA

Throughout debate and passage of the ADA, Congressional sponsors reiterated the statute's important goal of extending opportunities to individuals with disabilities. As Senator Harkin stated, "For too long, individuals with disabilities have been excluded, segregated, and otherwise denied equal, effective, and meaningful opportunity to participate in the economic and social mainstream of American life. It is time we eliminate these injustices." 135 Cong. Rec. S10711 (daily ed. Sept. 7, 1989) (statement of Sen. Harkin). Extending coverage under the ADA to individuals based merely on a subset of tasks in a major life activity would expand the protected class well beyond the statutory definition and create substantial problems for both employers and employees.

Most importantly, an overly expansive reading of the protected class could compromise the rights the ADA has created for those truly in need of statutory protection. The ADA requires that employers provide reasonable accommodation to individuals with disabilities unless doing so would impose an "undue hardship" on the employer's business. 42 U.S.C. § 12112(b)(5)(A). While some accommodations, standing alone, would not impose an undue hardship, a number of accommodations in the aggregate may well reach that level. The greater the number of individuals entitled to accommodation, the sooner the next person to need an accommodation will be denied one because providing that additional accommodation would impose an undue hardship on the employer's business. By vastly expanding the protected class, the Sixth Circuit thus has jeopardized the protection that the ADA provides for those who have true disabilities within the statutory definition of that term.

The Sixth Circuit's opinion may even jeopardize an employer's operations by forcing it to respond to virtually

every request for an accommodation, regardless of whether the individual actually suffers from a disability under the ADA. The standard the Sixth Circuit has adopted is so broad that employers will be hard pressed to determine whether an individual has an ADA-covered disability when the individual first requests an accommodation. In view of this uncertainty, employers may have little choice but to grant the accommodation, despite the rigorous standards the ADA actually imposes to determine whether one has a statutorily protected disability.

As a result, employers may end up with a workforce that is limited in multiple, potentially inconsistent ways. For example, some employees may have lifting restrictions, some may have bending restrictions, and some may have restrictions on how long they can stand. The employer will have to try to reconcile all of these restrictions in order to run its business. In the end, however, the employer may discover that it lacks enough employees who can perform all the tasks necessary to operate its business and may have to pare down its operations as a result.

EEAC's and NAM's members have a long history of providing equal employment opportunities for individuals with disabilities and a strong commitment to nondiscrimination. These exemplary employers support the goals of the ADA as applied to individuals with disabilities. Those efforts will become diluted, however, if the definition of what constitutes a disability under the ADA is expanded to include relatively minor impairments as disabilities, even though they do not fit the statutory definition of the term.

D. The Sixth Circuit Erred in Lowering the Burden of Proof To Establish a Disability Under the ADA

The Sixth Circuit concluded that Williams is substantially limited in the major life activity of "performing manual tasks" because her impairments:

> prevent her from doing the tasks associated with certain types of manual assembly line jobs, manual product handling jobs and manual building trade jobs (painting, plumbing, roofing, etc.) that require the gripping of tools and repetitive work with hands and arms extended at or above shoulder levels for extended periods of time.

Pet. App. 4a. The Sixth Circuit thus focused on the few job-related manual tasks Williams cannot perform, to the exclusion of the numerous others she can perform both inside and outside the workplace. In other words, the Sixth Circuit found that Williams is a member of the ADA's protected class because, out of all of the manual tasks that can be performed with the human hand, she is unable to perform some that are needed only at her job.

This broad view of the ADA's coverage conflicts directly with the statutory language defining the ADA's protected class in terms of an impairment that *substantially* limits a major life activity. For an individual to be limited in a major life activity, that person must be substantially limited as compared to the average person with respect to the *entire* activity, not merely a small subset of it. *See, e.g., Chanda v. Engelhard/ICC*, 234 F.3d 1219 (11th Cir. 2000) (employee's tendonitis, which severely restricted him typing or cutting foamboard for extended periods of time, only affected a *narrow category of tasks*, and thus did not substantially limit performance of manual tasks generally).

Moreover, the Sixth Circuit's broad interpretation, if extended to other major life activities, would inflate the

ADA's coverage exponentially. Under the Sixth Circuit's view, someone with a minor breathing problem, which prevented him only from using SCUBA gear, would be substantially limited in breathing because he could not get a job as a deep-sea diver. Someone who is colorblind would be substantially limited in seeing and thus protected by the ADA if he wanted to be an electrical technician but could not distinguish among color-coded wires. Someone with an average voice would be substantially limited in speaking if he could not produce the mellifluous tones so prized in a radio announcer. Such results would be well beyond the scope of the ADA. *See, e.g., Kelly v. Drexel Univ.*, 94 F.3d 102 (3d Cir. 1996) (individual who suffered a limp, could not walk more than a mile, could not jog, and had trouble climbing stairs was not disabled under the ADA).

This Court squarely rejected relaxing the standard for determining whether an individual is "disabled" under the ADA in *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555 (1999). In that case, this Court criticized the Ninth Circuit for "appear[ing] willing to settle for a mere difference" in ability rather than a substantial limitation as compared to the average person. *Id.* at 565.

This Court should prevent the Sixth Circuit from accomplishing the same goal—"undercut[ting] the fundamental statutory requirement that only impairments causing 'substantial limitations' in individuals' ability to perform major life activities constitute disabilities"—albeit through different means. *Id.* The decision circumvents the rationale in this Court's opinions in *Sutton* and *Albertson's*—to interpret the reach of the ADA narrowly to effectuate Congress' intent in enacting the legislation. For this reason, the Court should reverse the Sixth Circuit's decision in this case.

II. "WORKING" IS NOT PROPERLY A "MAJOR LIFE ACTIVITY" FOR ADA PURPOSES

A. The Court Below Used a Tortured Version of the "Working" Analysis To Reach Its Erroneous Conclusion

The Sixth Circuit's inappropriate standard is a curious misapplication of the analysis used previously by this Court regarding the activity of "working." Assuming without deciding that "working" is properly considered a major life activity under the ADA, this Court in *Sutton* addressed the meaning of "substantially limited" in that context. In so doing, the Court concluded that "[w]hen the major life activity under consideration is that of working, the statutory phrase 'substantially limits' requires, at a minimum, that plaintiffs allege they are unable to work in a broad *class* of jobs." *Sutton*, 527 U.S. at 491 (emphasis added). Using some of the same words, the Sixth Circuit allowed Williams to show a substantial limitation in "performing manual tasks"—by "show[ing] that her manual disability involves a 'class' of manual activities affecting the ability to perform tasks *at work*." Pet. App. 4a (emphasis added).

Indeed, had the Sixth or any other Circuit analyzed this set of facts in terms of whether Williams was substantially limited in "working," it would have concluded that she was not.[4] *See, e.g., McKay v. Toyota Motor Mfg., U.S.A., Inc.*, 110 F.3d 369 (6th Cir. 1997) (holding that employee who could not use vibrating tools or perform repetitive motions was not substantially limited in working); *Broussard v. University of Cal., at Berkeley*, 192 F.3d 1252 (9th Cir. 1999) (former employee with carpal tunnel syndrome was not

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[4] Counsel for Williams conceded at oral argument before the Sixth Circuit that Williams's strongest claim was that she was substantially limited in the major life activity of performing manual tasks, not working. Pet. App. 4a n.1.

substantially limited in working); *Dutcher v. Ingalls Shipbuilding*, 53 F.3d 723 (5th Cir. 1995) (arm injury that prevents heavy lifting, repetitive rotational movements and holding objects tightly or up high for long periods of time does not substantially limit plaintiff from working).

B. The EEOC Lacks Congressional Authority To Define "Disability"

The ADA itself does not define the scope of the term "major life activities," nor does it establish that "working" falls within the definition. The EEOC, to whom Congress gave statutory authority to interpret the employment provisions contained in Title I of the ADA, issued regulations defining "major life activities" as "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and *working*." 29 C.F.R. § 1630.2(i) (2000) (emphasis added). Based on the EEOC's definition, most parties and courts had accepted "working" within this definition without question.

In *Sutton*, this Court observed that "[n]o agency . . . has been given authority to issue regulations implementing the generally applicable provisions of the ADA, see §§ 12101-12102, which fall outside Titles I-V. Most notably, no agency has been delegated authority to interpret the term 'disability.' § 12102(2)." *Sutton*, 527 U.S. at 479. Thus, the EEOC's regulation defining "major life activities" to include "working" is not entitled to deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984), since the EEOC had no authority to promulgate it. *United States v. Mead Corp.*, No. 99-1434, 2001 U.S. LEXIS 4992, at *19-20 (June 18, 2001) (slip op. at 12).

Nor does the regulation deserve any deference under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). As the Court stated in *Skidmore*, an agency view that is not controlling can

be useful as guidance "depend[ing] upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Id.* at 140. As we show below, the EEOC's definition of "major life activities" as including "working"—about which the agency itself has expressed doubt—lacks such persuasive force.

C. This Court's Concern That the Inclusion of "Working" as a "Major Life Activity" Under the ADA Creates a Circular Definition Is Well-Founded

This Court itself has suggested that including working within the definition of "major life activities" is not a permissible construction of the statute. In *Sutton*, the Court observed that:

> there may be some conceptual difficulty in defining "major life activities" to include work, for it seems "to argue in a circle to say that if one is excluded, for instance, by reason of [an impairment, from working with others] . . . then that exclusion constitutes an impairment, when the question you're asking is, whether the exclusion itself is by reason of handicap."

Sutton, 527 U.S. at 492 (citation omitted).[5] As this Court discerned, an individual's exclusion from work becomes both the reason for and the effect of the disability. This construct, however, is circular and thus impermissible.

"Clearly, the inability to work cannot also be the reason for the exclusion. Such a concept creates a circular argument that was not intended in the ADA." Mark R. Frietas, *Closing*

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[5] The Supreme Court did not decide what deference to give the EEOC's definition in *Sutton* since neither of the parties had questioned its validity. *Sutton*, 527 U.S. at 492.

the Floodgates: The Employee's Duty to Mitigate and Why Working Is Not a Major Life Activity, 19 Rev. Litig. 465, 482 (2000). Viewing "working" as a major life activity circumvents the statute's separate and distinct requirements that an individual both have a physical or mental impairment that substantially limits a major life activity and be harmed because of the disability in order to benefit from the protection of the ADA.

Recently, three members of the Court of Appeals for the D.C. Circuit similarly questioned whether "working" is properly a major life activity within the meaning of the ADA in *Duncan v. Washington Metropolitan Area Transit Authority*, 240 F.3d 1110 (D.C. Cir. 2001). These judges expressed concern that defining the term "disability" based on one's treatment in the workplace draws attention away from an individual's physical or mental condition, the intended focus of the ADA.

> [T]o make "working" a major life activity is to create a residual category, one that matters only if the individual is not suffering from some serious physical or mental impairment. (If the individual is so suffering there is no need to consider working as a separate category). When "working" is used in this way, the existence of a disability will necessarily turn on factors other than the individual's physical characteristics or medical condition.

Id. at 1118 (citations omitted) (Randoph, Williams & Sentelle, JJ., concurring).

As this Court also pointed out in *Sutton*, the EEOC itself showed trepidation about including "working" within the definition of "major life activities," making "working" the major life activity of "last resort," to be used only if no other

major life activity is substantially limited. 527 U.S. at 492.[6] This is a telling statement. If no other major life activity is affected, it would seem unwise to confer ADA coverage on such a circular basis, particularly in light of the millions of individuals who are substantially limited in major life activities such as seeing, hearing, speaking, walking, and performing manual tasks—and yet are working.

D. The Vague and Amorphous Concept of "Substantially Limited in Working" Violates the ADA's Mandate To Provide "Clear, Strong, Consistent, Enforceable Standards" To Address Discrimination

One express purpose of the ADA is to "provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(2). Clear and consistent standards would enable covered entities to understand their obligations under the ADA, which in turn, would help them achieve the goals of the statute.

Including working as a major life activity under the ADA, however, has created confusion on what the law requires and is problematic for both employers and employees. *See also* Section I.C., *supra*.

The concept of working as a major life activity is remarkably amorphous, encompassing an almost limitless range of widely varied tasks. In fact, "working" is really a collection of activities, not discrete by itself. As such, a substantial limitation in working must result from an individual's difficulties in performing other activities.

---

[6] *See* 29 C.F.R. pt. 1630, App. (2000) (§ 1630.2(j)).

As a practical matter, this results in standards that are virtually impossible to meet. As one commentator aptly has concluded:

> disability claims based upon the major life activity of working should be deemed insufficiently specific because they do not afford an employer the opportunity to consider any accommodations. While an employer could in certain situations reasonably accommodate an employee's specific disability (such as hearing, seeing, or walking), the employer cannot be expected to accommodate an employee's inability to work. The condition alleged is simply too vague.

Frietas, *supra*, at 481.

The three judges who concurred in the *Duncan* opinion raised similar concerns about the lack of standards for employers as a result of identifying "working" as a major life activity.

> From the employer's point of view, the standards will hardly appear "clear," 42 U.S.C. § 12101(b). When "working" is the allegedly impaired major life activity, how is the employer to determine whether the employee is disabled (and thus entitled to a reasonable accommodation)? The employer certainly cannot tell just by looking at the employee, or by consulting medical records, or by insisting upon a physical examination. Disability will depend on the job market, on whether there are jobs in some undefined region "utilizing an individual's skills (but perhaps not his or her unique talents)," jobs for which the employee is qualified. Exactly how the employer is to make that determination is far from certain.

Duncan, 240 F.3d at 1118 (citation omitted) (Randolph, Williams & Sentelle, JJ., concurring). These judges noted that varied outcomes inevitably will result depending on the

particular circumstances affecting the individual's own employment prospects. Whether individuals are disabled thus may have less to do with their physical or mental conditions than with how many and what types of jobs are available in their geographic area. These differences, however, conflict with the ADA's express purpose of providing "clear, strong, *consistent*, enforceable standards addressing discrimination against individuals with disabilities." 42 U.S.C. § 12101(b) (emphasis added); *see also Duncan*, 240 F.3d at 1118 (concurring opinion).

In the end, as even Judge Edwards recognized in his dissent in *Duncan*, including "working" as a major life activity may expand the scope of the ADA well beyond what Congress envisioned.

> [A]n expansive view of work as a major life activity might allow a person to claim a disability and discrimination under the ADA if he/she is allegedly denied work for a physical impairment, such as cosmetic disfigurement, which does not rise to the level of an underlying handicap. In this sense, "work" is arguably over-inclusive when viewed as a major life activity, at least when considered in conjunction with the principal purposes of the ADA.

Duncan, 240 F.3d at 1122 (Edwards, J., dissenting). This Court should halt this unprecedented expansion now by refusing to recognize working as a major life activity under the ADA.

E. Working Is Not Intrinsically Central Enough to Life To Be a Major Life Activity

Working, as an activity, does not approach the level of importance commonly ascribed to the other life activities recognized as major under the ADA. For example, in holding that reproduction was a major life activity, this Court found that "[r]eproduction and the sexual dynamics surrounding it

are central to the life process itself." *Bragdon v. Abbott*, 524 U.S. 624, 638 (1998)

In contrast, while some people are called "workaholics," many individuals do not work—or do not work full time—and for a variety of reasons. Some adults choose not to work, because they have other priorities such as caring for children, or because they are financially independent, or because they are simply not interested. Some people do not work because they are children, or because they have chosen to retire. Other individuals are unemployed involuntarily; they may want to work, but cannot find a job.

For all of these people, their unemployment may stretch from days to months to years, yet their lives continue. Their unemployment need not even affect their other activities, as a substantial limitation in seeing, or breathing, or walking would. Accordingly, "working," if it could be considered a single activity, would not be "major" under the ADA.

CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be reversed.

Respectfully submitted,

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TOYOTA MOTOR MANUFACTURING, KENTUCKY, INC.,
Petitioner,

v.

ELLA WILLIAMS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF *AMICUS CURIAE* OF THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF RESPONDENT

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Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 Harv. C.R.-C.L. L. Rev. 99 (1999) 4, 9, 10, 11, 14

John W. Parry, *1999 Employment Decisions Under the ADA Title I – Survey Update*, 24 Ment. & Phys. Disability L. Rptr. 348 (May-June 2000) 9

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INTEREST OF *AMICUS CURIAE*[1]

The National Employment Lawyers Association (NELA) is a voluntary membership organization of more than 3,000 attorney members who regularly represent employees in labor, employment, and civil rights disputes. NELA is the country's only professional membership organization of lawyers who represent employees in discrimination, wrongful discharge, employee benefit, and other employment-related matters.

As part of its advocacy efforts, NELA regularly supports precedent setting litigation affecting the rights of individuals in the workplace. NELA has filed numerous *amicus curiae* briefs before the U.S. Supreme Court and the federal appellate and district courts regarding the proper interpretation and application of employment discrimination laws to insure that the laws are fully enforced and that the rights of workers are fully protected. Some of the more recent cases before this Court include: *Pollard v. E.I. du Pont de Nemours & Co.*, No. 00-763 (U.S. June 4, 2001); *Reeves v. Sanderson Plumbing Products*, 530 U.S. 133 (2000); and *Cleveland v. Policy Management Systems Corp.*, 526 U.S. 795 (1999).

NELA members have brought numerous cases under the Americans with Disabilities Act (ADA). NELA members have also represented thousands of individuals in this country who are victims of employment discrimination based on disability status. One of the primary purposes of NELA is to represent, protect, and defend the interests of

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[1] The consents of the parties have been filed with the Clerk of the Court. Pursuant to Supreme Court Rule 37.6, *Amicus Curiae* NELA states that no counsel for any party authored this brief in whole or in part and that no party or entity other than *amicus curiae*, its members, or counsel made a monetary contribution to the preparation or submission of this brief.

employees involved in workplace disputes, as such, NELA has a compelling interest in ensuring that the goals of the ADA are protected and fully realized.

INTRODUCTION

As this Court has recognized, the Americans with Disabilities Act of 1990 ("ADA")[2] extends civil rights protections to those in our society with "substantial limitations on major life activities, not utter inabilities." *Bragdon v. Abbott*, 524 U.S. 624, 641 (1998). "The ADA seeks to eliminate unwarranted discrimination against disabled individuals in order both to guarantee those individuals equal opportunity and to provide the Nation with the benefit of their consequently increased productivity." *Cleveland v. Policy Mgmt. Syst. Corp.*, 526 U.S. 795, 801 (1999) (citing 42 U.S.C. § 12101(a)(8), (9)).

The overarching goal of the ADA is the removal of artificially constructed barriers that restrict access to full citizenship for the more than 17%[3] of the Nation's population that has one or more disabilities. These barriers—both concrete and attitudinal—prevent people with disabilities from being productive members of our society, relegating them to second-class citizenship, dependant upon state and

[2] 42 U.S.C. § 12101 *et seq.*

[3] Congress found that there were 43 million people with disabilities when the Act was passed in 1990, and the number was growing. In that year, the U.S. Census Bureau reported the nation's population at 248,709,873. *See* <http://www.census.gov>. Thus, Congress intended to extend civil rights coverage to 17.3% of the U.S. population and recognized that that proportion would likely rise over the years.

federal welfare systems for subsistence.[4] In 1990, the overwhelmingly bipartisan efforts of Congress (spearheaded by Senators Dole and Kennedy; ceremoniously signed by President George H.W. Bush) resulted in the most sweeping civil rights legislation in a generation. Indeed, the ADA fundamentally shifted the dominant paradigm of legislation regarding people with disabilities from one of handouts and entitlement programs to one of fundamental civil rights and citizenship. That legislation took direct aim at destructing the barriers that society had built.

Unfortunately, ten years after the adoption of the ADA, the Nation has seen the construction of yet another such barrier. This time, it is not a matter of the pernicious attitudes of those who intentionally discriminate against this class of people, but of the unjustifiably restrictive application of the law by many lower courts. The Petitioner would have this Court buttress that barrier. We urge the Court to reject that request and affirm the Sixth Circuit ruling.

SUMMARY OF ARGUMENT

1. There is a real and calculable trend in the lower courts that has turned the proclamations of both Congress and this Court on their head. To be specific, the lower courts have consistently misapplied the well-articulated standards for summary judgment[5] to the detriment of those seeking the protections of the ADA. *See* Ruth Colker,

[4] The legislative history of the ADA observes that "[e]xcluding the millions of disabled who want to work from the employment ranks costs society literally billions of dollars annually in support payments and lost income tax revenues." H.R. Report No. 101-485(II), 43 (quoting Statement by Vice President George Bush on Disabled Americans, March 31, 1988, p.2).

[5] Fed. R. Civ. Pro. 56; *see also* Fed. R. Civ. Pro. 50.

The Americans with Disabilities Act: A Windfall for Defendants, 34 Harv. C.R.-C.L. L. Rev. 99, 110-26 (1999); Robert L. Burgdorf, Jr., *"Substantially Limited" Protection from Disability Discrimination: The Special Treatment Model and Misconstructions of the Definition of Disability*, 42 Villanova L. Rev. 409, 536-51 (1997). In effect, the lower courts have ruled that in order to reach a jury, an ADA plaintiff must *prove* that he or she meets the statute's definition of disability, as opposed to *raising a triable issue* as to the question of whether he or she meets that definition. In so doing, the lower courts have ignored and/or misread binding precedents of this Court. *See e.g., Murphy v. United Parcel Svc.*, 527 U.S. 516, 524 (1999) ("The evidence that petitioner is regarded as unable to meet the DOT regulations is not sufficient to *create a genuine issue of material fact* as to whether petitioner is regarded as unable to perform a class of jobs using his skills.") (emphasis added); *see also Reeves v. Sanderson Plumbing Co.*, 530 U.S. 133, 149-54 (2000) (unanimously reversing the lower court's improper application of standards for judgment as a matter of law in employment discrimination context). The district court's decision in this case demonstrates precisely this phenomenon. *See* Pet. App. 23a-47a. Petitioner now seeks to have that erroneous determination reinstated by overturning the Sixth Circuit's principled application of summary judgment standards.

2. In constructing this artificial barrier, the lower courts have ignored the teachings of this Court's past rulings on the definition of disability under both section 504 of the Rehabilitation Act of 1973[6] (Section 504) and the ADA. *School Bd. of Nassau Cty. v. Arline*, 480 U.S. 273 (1987); *Bragdon v. Abbott, supra*; *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999); *Murphy v. United Parcel*

[6] 29 U.S.C. § 794.

Svc., supra; *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555 (1999). Specifically, this Court's interpretation of the definition of disability has consisted of an application of common sense and common experience to the facts of the case. Where the plaintiff is the nonmoving party, this Court has not required that plaintiffs bring forth extensive testimony from retained experts in order to demonstrate a triable issue of fact as to disability, nor has it required that plaintiffs prove that they definitively met the statutory definition. Rather, the Court dispassionately approached each case with common sense and with an eye on the appropriate standard for summary judgment.

3. The Sixth Circuit panel in this case properly applied the relevant summary judgment standards and faithfully followed the teachings of this Court in regard to both those standards and the definition of disability. The panel considered all the evidence. Pet. App. 2a. It construed all inferences in favor of the nonmoving plaintiff. *Ibid.* The panel faithfully applied the substantive law. *Id.* at 3a-7a. Ultimately, the panel appropriately found that the respondent had presented sufficient evidence in regard to her disability to have a jury determine whether, in fact, she falls within the confines of the statutory definition of disabled, and is thereby eligible for the protections of the Act. *Id.* at 4a-5a. By urging this Court to reverse that finding, the Petitioner seeks to have this Court endorse the elevated burden of proof that the district court required of the Respondent. Not only should this Court reject that effort, it should also take this opportunity to instruct the lower courts as to the proper burdens to be assessed to a nonmoving plaintiff who is seeking to establish eligibility for coverage under the ADA.

ARGUMENT

I. THOUGH THIS COURT HAS ARTICULATED THE PROPER ROLE OF JUDGE AND JURY IN EMPLOYMENT DISCRIMINATION CASES, LOWER COURTS HAVE CONSISTENTLY SUBSTITUTED THEIR OWN JUDGMENT FOR THAT OF THE JURY AND UNJUSTIFIABLY HEIGHTENED THE BURDEN UPON ADA PLAINTIFFS.

A. The Lower Courts' Role on Summary Judgment is To Guard Against Frivolous and Facially Meritless Claims From Consuming Judicial Resources, Not To Pre-Judge The Ultimate Facts.

As restated last year, this Court has articulated an exacting standard for the grant of defense-initiated summary judgment in employment discrimination cases. *See Reeves v. Sanderson Plumbing Products, Inc.*, *supra*, 530 U.S. at 149-54. In *Reeves*, the unanimous Court summarized the combined teaching of what has become known as the summary judgment trilogy,[7] as follows:

1. The court must review the record, "taken as a whole";
2. The court must draw all inferences in favor of the nonmoving party;
3. The court may not make credibility determinations;
4. The court may not weigh evidence;
5. The court must disregard all evidence favorable to the moving party that the jury is not required to believe;

[7] *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

6. The court should give credence to the evidence favoring the nonmovant;
7. The court should give credence to the evidence that supports the moving party "that is uncontradicted and unimpeached, at least to the extent that the evidence comes from disinterested witnesses."

Id. at 150-51 (citations omitted). In the end, the court must ask whether a reasonable jury *might* find in favor of the plaintiff. *Liberty Lobby*, *supra*, 477 U.S. at 250. If so, then summary judgment must be denied.

The overriding theme of these instructions to the lower courts is that the jury is the true arbiter of such disputes. While the courts should vigilantly guard against wasting valuable resources on frivolous and facially meritless cases, the courts should be equally vigilant in assuring that civil rights plaintiffs have the opportunity to have their claims adjudicated by their peers.

It goes without saying that the plaintiff in an ADA case has a burden of production as the nonmoving party facing summary judgment. *Liberty Lobby*, 477 U.S. at 250. However, it cannot be overemphasized that this burden is only one of raising a genuine issue of material fact as to disability, not one of actually proving eligibility for coverage under the Act. *Murphy, supra*, 527 U.S. at 523-34; *see also Liberty Lobby*, 477 U.S. at 248 (a material fact is one that "might affect the outcome of the suit under governing law.") Moreover, the moving party has an initial burden of production to demonstrate that it is entitled to judgment as a matter of law. *Celotex*, 477 U.S. 317, 323. The moving party may not simply rest on a bare assertion; it must point to evidence in the record that no genuine dispute of material fact exists. *Id.* at 322; *Liberty Lobby*, 477 U.S. at 250; *Matsushita*, 475 U.S. at 585-88.

B. The Lower Courts Have Consistently Imposed an Almost Insurmountable Burden on ADA Plaintiffs at Summary Judgment

1. In an ADA case, as in any employment discrimination case, the plaintiff has the ultimate burden of demonstrating that she or he is eligible for the protections afforded by the statute. Unlike the more familiar cases brought for race or gender discrimination under the provisions of the Civil Rights Act of 1964,[8] demonstrating eligibility in an ADA case is more than a rote exercise of stating the obvious (*e.g.*, "the plaintiff is a woman"; "the plaintiff is African-American," etc.). Specifically, the plaintiff has the ultimate burden of persuasion, by a preponderance of the evidence, that she or he:

> (A) [has] a physical impairment that substantially limits one or more of the major life activities of such individual;
>
> (B) [has] a record of such an impairment; or
>
> (C) [is] being regarded as having such an impairment.

42 U.S.C. § 12112(2). The question of how that burden has been allocated on defendants' motions for summary judgment is of primary concern.

It should be axiomatic that, on summary judgment, a nonmoving plaintiff need only demonstrate a disputed issue of material fact regarding her or his eligibility for coverage under the ADA. *See e.g., Murphy*, 527 U.S. at 523 ("The only issue remaining is whether the evidence . . . *is sufficient to create a genuine issue of material fact* as to whether petitioner is regarded as substantially limited in one or more major life activity." (emphasis added).) The lower courts, however, have articulated a much more demanding standard of proof in ADA cases. The combined effect of the multitudinous adverse rulings has meant that plaintiffs have been forced to actually *prove* that they meet the definition just to survive summary judgment. *See Duncan v. Washington Metro Area Transit Auth.*, 240 F.3d 1110, 1112 (D.C. Cir. 2001) (en banc), *petition for cert. filed*, May 25, 2001 (Edwards, C.J., dissenting) ("The result reached by the majority in this case will make 'work' impermissibly underinclusive when viewed as a major life activity, in a way that appears to defy Congress' mandate in enacting the ADA."); *Thornton v. McClatchy Newspapers, Inc.*, ___ F.3d ___, 2001 U.S. App. LEXIS 18372 * 35-36 (9th Cir. Aug. 15, 2001) (Berzon, J., concurring in part, dissenting in part) (decrying the majority's "en masse, quantitative approach to assessing the significance of various manual tasks" as an unjustifiably heightened scrutiny for determining whether a plaintiff is substantially limited).

Indeed, extensive statistical analysis confirms that only the very select few ADA plaintiffs are permitted to see a jury. *See* Colker, *supra*, 34 Harv. C.R.-C.L. L. Rev. at 119 ("The overwhelming trend under the ADA has been for judges to decide most of the normative, factual issues themselves and rarely send cases to the jury.");[9] *see also* John W. Parry, *1999 Employment Decisions Under the ADA Title I—Survey Update*, 24 Ment. & Phys. Disability L. Rptr. 348 (May-June 2000) (finding that employers are victorious in 95.7% of ADA cases brought under Title I). In her authoritative study, Professor Colker created a data set from all available opinions from 1992-1998 regarding Title I of the ADA. 34 Harv. C.R.-C.L. L. Rev. at 103. She

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[8] 42 U.S.C. § 2000e *et seq.*

[9] Importantly, through her analysis, Professor Colker found that, due to tendencies in reporting of decisions, the defendants' victory rate was actually *underrepresented* in the final tally. *Id.* at 105.

gleaned rulings from all available sources, official and otherwise, and detailed the outcomes. *Id.* at 103-05. After employing accepted statistical principles, Professor Colker discovered that the lower courts have amassed a startling record of employer victories in ADA cases, with a remarkably high rate of grants of summary judgment. *Id.* at 103-110.[10] "These results are worse than results found in comparable areas of law; *only prisoner rights cases fare as poorly*." *Id.* at 100 (citation omitted) (emphasis added).

Obviously, the above findings are not in line with Congressional proclamations that disability discrimination "continue[s] to be a serious and pervasive social problem" and that in excess of 17% of our population has one or more disabilities. 42 U.S.C. § 12101(a)(1), (2); *see also* Burgdorf, *supra*, 42 Villanova L. Rev. at 539 ("The results in many of these decisions are manifestly inequitable and, because the constriction of the protection against discrimination is at odds with the underlying aims of the ADA and the Rehabilitation Act, often illogical.").[11]

Other scholars have reached similar conclusions regarding the high rates of employer victories in ADA cases, but ascribe them to different causes. *See generally*, Jeffrey A. Van Detta, Dan R. Gillipeau, *Judges and Juries: Why Are So Many ADA Plaintiffs Losing Summary Judgment Motions, and Would They Fare Better Before A Jury? A Response to Professor Colker*, 19 Rev. Litig. 505 (2000). However, the solutions posed by those critics simply go to prove the point. Van Detta and Gillipeau argue that ADA

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[10] A more thorough detail of Professor Colker's findings broken down by Circuit is published at <http://www.osu.edu/units/law/colkerapp-a.htm>.

[11] The Court will recall that Professor Burgdorf was the drafter of the original bill that became the ADA. *See Sutton, supra*, 527 U.S. at 485.

plaintiffs lose summary judgment at such high rates because they fail to properly present their cases to the court. Specifically, Van Detta and Gillipeau criticize ADA plaintiffs (and their attorneys) for failing to bring detailed, expert vocational testimony to the attention of the court at summary judgment. *Id.* at 531. However, requiring ADA plaintiffs to obtain and proffer expert testimony at the summary judgment stage for purposes of raising a triable issue as to disability is no more than the insertion of an artificial barrier to people with disabilities. No other protected class is required to proffer such time-consuming and costly testimony. No other protected class is forced to hurdle such high evidentiary burdens on summary judgment. Indeed, requiring such a burden is in direct contradiction to the regulatory admonition that a plaintiff's *ultimate* burden (*i.e.*, at trial) is "not onerous." 29 C.F.R. § 1630.2, App. § 1630.2(j). All that should be required is reliable evidence of the impairment and commonsense analysis of major life activities and how they are affected by that impairment. Indeed, that is all that this Court has needed in making the same determination. *See infra* § II. In the final analysis, it is undeniable that "the summary judgment tool [is] a device used with great frequency at the trial court level to dispose of ADA cases in favor of defendants." Colker, 34 Harv. C.R.-C.L. L. Rev. at 126.

2. The cases behind the stark statistics demonstrate how these judicially-created barriers have displaced commonsense analysis and the plain meaning of the statute. The lower courts have routinely dismissed cases where the plaintiff has such obvious disabilities as severe and chronic depression,[12] obsessive compulsive dis-

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[12] *Schneiker v. Fortis Insurance Company*, 200 F.3d 1055 (7th Cir. 2000) (benefits analyst with depression and alcoholism requiring

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hospitalizations, medication, outpatient care, and AA meetings not substantially limited); *Pack v. Kmart Corporation,* 166 F.3d 1300 (10th Cir. 1999) (employee with major depression, terminated after 18 years, not disabled despite chronic sleeping problems); *Spades v. City of Walnut Ridge,* 186 F.3d 897 (8th Cir. 1999) (police officer with depression who attempted suicide not substantially limited); *Soileau v. Guilford of Maine, Inc.*, 105 F.3d 12 (1st Cir. 1997) (employee with chronic depression, terminated after 15 years, not disabled despite difficulties in interacting with others); *Scherer v. G.E. Capital Corp.,* 59 F. Supp. 2d 1132 (D. Kan. 1999) (fraud investigator with bipolar disorder and obsessive compulsive disorder not disabled); *Robb v. Horizon Credit Union,* 66 F.Supp.2d 913 (C.D. Ill. 1999) (credit union employee with depression and suicidal episode requiring three-week hospitalization and two-month leave of absence, who returned to work to encounter office gossip regarding her "nervous breakdown," was not substantially limited); *Matuska v. Hinckley TWP,* 56 F. Supp. 2d 906 (N.D. Ohio 1999) (laborer with depression, post-traumatic stress disorder, panic attacks and hospitalization not disabled); *Osika v. Board of Education,* 1999 U.S. Dist. LEXIS 17996 (N.D. Ill. 1999) (high school teacher with clinical depression not disabled despite testimony regarding problems caring for self); *Nave v. Woolridge Construction*, No. 96-2891, 10 N.D.L.R. ¶ 183, 1997 U.S. Dist. LEXIS 9203 (E.D. Pa. 1997) (landscape worker with Hodgkin's disease and related major depression, terminated four months after return from leave of absence for treatment and less than a month after fainting episode at work, not disabled); *Gaul v. AT&T,* 955 F. Supp. 346 (D. N.J. 1997) (senior technical associate with stress disorders and major depression requiring at least one hospitalization not disabled); *Thompson v. City of Arlington*, 838 F. Supp. 1137 (N.D. Tex. 1993) (police officer with depression, suicide attempt, and hospitalization not disabled); *Sarko v. Penn-Del Directory Co.*, 968 F. Supp. 1026 (E.D. Pa. 1997) (top performing telephone sales representative with depression and anxiety, terminated for tardiness related to medications, was not substantially limited); *Overton v. Tar Heel Farm Credit*, 942 F.

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order,[13] paralysis from stroke,[14] hemophilia,[15] severe asthma,[16] traumatic brain injury,[17] epilepsy,[18] multiple

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Supp. 1066 (E.D.N.C. 1996) (employee with obsessive compulsive disorder, anxiety and depression, terminated within three days of employer learning of conditions, not disabled); *Marschand v. Norfolk & Western Railway Co.*, 876 F. Supp. 1528 (N.D. Ind. 1995), *subsequent judgment aff'd*, 81 F.3d 714 (7th Cir. 1996) (train engineer with post-traumatic stress disorder and mental breakdown following fatal train accident not disabled); *Kaniff v. Allstate Ins. Co.*, 1996 U.S. Dist. LEXIS 2248 (N.D. Ill. 1996), *aff'd on other grounds,* 121 F.3d 258 (7th Cir. 1997) (insurance agent with depression requiring two-year leave of absence not disabled).

[13] *Scherer v. G.E. Capital Corp., supra*; *Overton v. Tar Heel Farm Credit, supra.*

[14] *Reidlich v. Albany Law Sch.*, 899 F. Supp. 100 (N.D.N.Y. 1995) (college professor with partial paralysis from stroke, not substantially limited).

[15] *Bridges v. City of Bossier*, 92 F.3d 329 (5th Cir. 1996), *cert. denied*, 117 S. Ct. 770 (1997).

[16] *Tangires v. The Johns Hopkins Hospit.*, 79 F. Supp. 2d 587 (D. Md. 2000) (interior design coordinator with lifelong asthma terminated after hospitalization for severe asthma attack and other respiratory-related ailments, not disabled); *Muller v. Costello,* 187 F.3d 298 (2d Cir. 1999) (correctional officer with severe bronchitis and asthma causing numerous emergency room visits and absences not substantially limited in breathing).

[17] *Phillips v. Wal-Mart Stores,* 78 F. Supp. 2d 1274 (S.D. Ala. 1999) (employee with traumatic brain injury causing four-month coma, blurred vision, and slowed speech, was terminated after encountering on-the-job jokes about his slow speech and thinking, but was not disabled).

[18] *E.E.O.C. v. Sara Lee Corp.*, 237 F.3d 349 (4th Cir. 2001) (factory worker who experienced nocturnal and daytime seizures once or

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sclerosis,[19] and seizure disorder.[20] The absurdity of these rulings is only emphasized in light of the legislative history of the ADA, which recognized emotional illness, epilepsy, and multiple sclerosis among the many sources of disabilities. H.R. Rep. No. 101-485(II) 51-52.

To be sure, not all cases should reach a jury. The summary judgment mechanism can be properly utilized to ensure that only legitimate cases proceed. However, frivolous cases make up only a minuscule proportion of the cases being thrown out on summary judgment. *See* Colker, 34 Harv. C.R.-C.L. L. Rev. at 106 (eliminating all frivolous cases from data set—resulting in the elimination of fewer than twelve cases).[21] In contrast, lower courts have routinely found plaintiffs to be not disabled in a wide array of

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twice a week not disabled); *Arnold v. City of Appleton*, 97 F. Supp. 2d 937 (E.D. Wis. 2000) (applicant denied firefighter position after disclosure of epileptic condition, not disabled); *Popko v. Pennsylvania State Univ.*, 84 F. Supp. 2d 589 (M.D. Pa. 2000) (medical technologist with sleep-related seizure disorder not disabled); *Rutlin v. Kerley & Starkes*, 75 F. Supp. 2d 735 (W.D. Mich. 1999) (funeral director with epilepsy not disabled); *Todd v. Academy Corp.*, 57 F. Supp. 2d 448 (S.D. Tex. 1999) (stocker with lifelong epilepsy not disabled).

[19] *Sorensen v. University of Utah*, 194 F.3d 1084 (10th Cir. 1999) (nurse with multiple sclerosis, forcibly reassigned immediately after five-day hospitalization, not disabled).

[20] *Spradley v. Custom Campers, Inc.*, 68 F. Supp. 2d 1225 (D. Kan. 1999) (transportation worker with generalized seizure disorder causing black-outs not disabled).

[21] Professor Colker classified frivolous cases as "those that sued a non-covered entity, sued for conduct that occurred before the ADA became effective, or otherwise brought a claim that could not possibly be covered by the ADA." 34 Harv. C.R.-C.L. L. Rev. at 106, n. 39.

cases where common experience would militate against such rulings.[22]

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[22] *Thornton v. McClatchy Newspapers, Inc.*, *supra* (newspaper reporter who is restricted to continuous typing no more than 30 minutes per day or intermittent typing no more than 90 minutes per day and continuous handwriting no more than 5 minutes per day, not disabled); *Duncan v. Washington Metro Area Transit Auth.*, *supra* (reversing jury verdict in favor of transit worker who presented medical evidence of back injury and testified about restricted employability); *Weber v. Idex Corp.*, 186 F.3d 907 (8th Cir. 1999) (sales manager with heart disease, heart attack, hypertension, and multiple hospitalizations not disabled); *EEOC v. R. J. Gallagher Co.*, 181 F.3d 645 (5th Cir. 1999) (blood cancer not an "actual" disability); *Berg v. Norand Corp.*, 169 F.3d 1140 (8th Cir. 1999) (financial manager with diabetes and psychiatric impairment requiring involuntary hospitalization, terminated several months later, not disabled); *Zirpel v. Toshiba America Information Systems*, 111 F.3d 80 (8th Cir. 1997) (terminated quality control manager with panic disorder hampering ability to breathe and speak was not disabled); *Sanders v. Arneson Products*, 91 F.3d 1351 (9th Cir. 1996), *cert. denied*, 117 S. Ct. 1247 (1997) (production manager with cancer, diagnosed by psychiatrist as having psychological reaction to illness, terminated after taking leave of absence for psychological difficulties, not disabled); *Tone v. U.S.P.S.*, 68 F. Supp. 2d 147 (N.D. N.Y. 1999) (tractor trailer operator who lost left eye to cancer not disabled); *Piascyk v. City of New Haven*, 64 F. Supp. 2d 19 (D. Conn. 1999) (patrol officer with multiple injuries from car accident, including arthritis and chronic sprain injuries, and who was rejected from promotion with statement, "you're injured," was not disabled); *Hurley v. Modern Continental Construction Company*, 54 F. Supp. 2d 85 (D. Mass. 1999) (project engineer with cardiac impairment causing loss of consciousness, and requiring two-month hospitalization and cardiac defibrillator, not disabled); *Glidden v. County of Monroe*, 950 F. Supp. 73 (W.D.N.Y. 1997) (applicant for nursing position, denied position after disclosing prior hospitalization for nervous breakdown, does not have disability).

Two recent cases demonstrate how tortured the application of the statutory definition of disability has become. In *Duncan v. Washington Metro. Transit Auth.*, *supra*, the D.C. Circuit, sitting en banc, reversed a jury finding for the plaintiff on the grounds that he had not produced sufficient evidence that he was disabled.[23] Mr. Duncan was employed by the transit authority as a custodian and parts runner. 240 F.3d at 1113. Over the years, Mr. Duncan developed back injuries that significantly limited his ability to lift. *Id.* at 1125-126 (Edwards, C.J., dissenting.). At trial, Mr. Duncan presented expert medical testimony and his own testimony regarding the nature, degree, and severity of his impairment. *Id.* at 1115. Mr. Duncan also presented evidence as to the range of jobs at the transit authority from which he was precluded and testified about his unsuccessful attempts to find employment in the region. *Id.* at 1115; *see also id.* at 1124-125 (dis. op.).

In overturning the jury's verdict, the D.C. Circuit announced that it was requiring plaintiffs to produce specific evidence as to "the number and kind of jobs available" to them in the geographic area in order to prove that they are substantially limited in the major life activity of working. *Id.* at 1115. The court took this drastic action even though the jury came to its decision after it was properly instructed as to the standards for proving disability. *Id.* at 1122 (dis. op.). The problems with the standard set in *Duncan* revolve around how plaintiffs are to produce such evidence. The court opined that it was not such a heavy burden; that such evidence could be demonstrated by use of statistics, like those found on the internet. *Id.* at 1117

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[23] The defendant appealed from a denial of a post-trial motion for judgment as a matter of law, pursuant to Fed. R. Civ. Pro. 50, which utilizes the identical standard as a motion for summary judgment pursuant to Rule 56. *See Reeves*, 530 U.S. at 149.

n. 5. Of course, the court failed to address how those statistical reports could be offered in order to overcome foundational and hearsay objections. Instead, what the court did was raise the standard of proof for a plaintiff in an ADA case.

The even more recent case from the Ninth Circuit demonstrates the elevation of form over function in this analysis to a degree that does not comport with the statutory language or the goals of the legislation. In *Thornton v. McClatchy Newspapers, Inc.*, *supra*, the court affirmed summary judgment against a newspaper reporter who has severe impairments to her arms and wrists. Ms. Thornton's physician had limited her typing and writing activities to (1) no more than 30 minutes per day of continuous keyboard use; (2) no more than 5 minutes per day of continuous handwriting; (3) no more than 60 minutes per day of intermittent keyboarding; and (4) no more than 60 minutes per day of intermittent handwriting. *Id.* at *3. Despite these obviously severe and widely impacting restrictions, the majority rejected Ms. Thornton's claims of disability, proclaiming that she had not submitted enough evidence of disability. *Id.* at *8-*20. Specifically, the court faulted her for not "present[ing] specific evidence about relevant labor markets." *Id.* at *10-*11.

In so ruling, the court completely disregarded any commonsense analysis of the true impact of Ms. Thornton's impairments. As the dissent astutely points out,

> It should not be necessary to prove that the ability to use one's arms and hands to produce, by computer (or by handwriting), written communication and records is a manual skill of enormous importance in our literate and technological society, and thus, "in the life of the average person." [citation]. The majority opinion, however, ignores this reality, treating the inability to perform the manual tasks of writing and keyboarding

as equivalent to, for instance, the inability to perform the task of "cutting foamboard."

Id. at *29 (Berzon, J., dissenting) (citations omitted). Instead, the court reaffirmed its heightened standard of proof for ADA plaintiffs.

II. THIS COURT'S PRECEDENTS INTERPRETING THE DEFINITION OF "DISABILITY" DEMONSTRATE THAT THE LOWER COURTS ARE IMPOSING AN OVERLY RESTRICTIVE ANALYSIS.

The phenomenon demonstrated above is simply not justified in light of this Court's prior decisions regarding the definition of "disability" in cases brought under the ADA and Section 504. Indeed, this Court has dutifully employed a commonsense approach to the question of disability.

In the first case in which this Court addressed the statutory definition of disability, *School Board of Nassau County v. Arline, supra,* the Court found that a woman with a history of tuberculosis met that definition. 480 U.S. at 280-81. In support of her claim, Ms. Arline adduced testimony from a physician who, after reviewing the medical records, testified that Ms. Arline's tuberculosis had affected her respiratory system and she required hospitalization for treatment. *Id.* at 276, 281. Based on this evidence, alone, this Court concluded that Ms. Arline met the statutory definition of disability. *Id.* at 281. Indeed, the Court concluded that the evidence of hospitalization was "*more than sufficient* to establish that one or more of her major life activities were substantially limited by her impairment." *Ibid.* (emphasis added). Notably, that hospitalization occurred *22 years prior to the adverse employment action* at issue in that case. *Id.* at 276, 281. Since that brief hospitalization, the only evidence of the disease was when it was detected in routine blood testing. *Id.* at 276. The

Court required no elevated standard of proof for the determination of disability. It required no expert testimony on the topic of what major life activities were impacted. It required no extensive statistical analysis of how Ms. Arline's impairment limited her employability. Rather, the Court engaged in a commonsense analysis—in line with the underlying nondiscrimination principles of Section 504.

In *Bragdon v. Abbott, supra*, the Court similarly engaged in a commonsense approach in holding that a woman with asymptomatic Human Immunodeficiency Virus (HIV) met the ultimate burden of persuasion (*i.e.*, the plaintiff moved for summary judgment) that she was disabled under the ADA. Relying upon generalized findings of medical studies, the Court first found that HIV is an impairment. 524 U.S. at 632-37. After finding that reproduction is a major life activity, the Court ruled that HIV presents a substantial limitation to that activity. *Id.* at 637-42. In reaching this conclusion, the Court relied upon the respondent's own testimony and evidence gleaned from medical studies that there is an 8% risk of transmitting HIV during gestation and childbirth. *Id.* at 639-42. As the Court recognized, "[w]hen significant limitations result from the impairment, the definition is met even if the difficulties are not insurmountable." *Id.* at 641. Again, this was the *plaintiff's* motion for summary judgment—her burden as the moving party was the same as at trial. *Ibid.* Even in this setting, her reliance on general medical data, in combination with her own testimony, was sufficient to meet that burden. It follows that a nonmoving plaintiff need not demonstrate the same level of evidence as adduced in *Bragdon*.

In *Sutton v. United Air Lines, Inc., supra*, the Court also relied on common sense in its analysis of whether the petitioners were "regarded as" substantially limited (42 U.S.C. § 12102(2)(C)) in the major life activity of working.

527 U.S. at 487-494.[24] The petitioners urged the Court to recognize "global airline pilot" as a class of jobs from which the respondents believed them to be precluded. *Id.* at 490-91. The Court rejected that argument, holding that such a category was too narrow to be considered a class of jobs. *Id.* at 491-94. Again, there was no need for broad statistical analysis or expert testimony, just enough common sense to make the statutory definition have some meaning. *See also Albertson's, Inc. v. Kirkingburg*, *supra*, 527 U.S. at 566-67 (observing that, based on the normal severity of the condition "people with monocular vision 'ordinarily' will meet the Act's definition of disability"; rejecting the respondent's claim because of his individual characteristics and symptomology.)

Finally, in *Murphy v. United Parcel Svc., Inc.*, *supra*, the Court determined that the petitioner had failed to adduce any evidence that he was regarded as substantially limited in the major life activity of working. 527 U.S. at 521-25. The sole evidence that the petitioner set forth in opposing summary judgment was testimony from his employer that he was precluded from being a mechanic when an essential function of the position included DOT certified driving. *Id.* at 522-24. The record in *Murphy* demonstrated that the petitioner's job as a mechanic was unique in that it required a DOT certification—something that is only required of people who drive vehicles weighing over 10,000 pounds. *Id.* at 524 (citing 49 C.F.R. § 390.5). As the Court stated, "Petitioner has put forward no evidence that he is regarded as unable to perform any mechanic job that does not call for driving a commercial motor vehicle and thus

[24] While *Sutton* was presented to the Court on appeal from a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), the Court's interpretation of the statutory language is obviously instructive for summary judgment motions.

does not require DOT certification." *Id.* at 524. Therefore, the Court reached the conclusion that to establish a "regarded as" claim, a plaintiff must a least raise a disputed issue of material fact, *id.* at 523, that the employer believed the plaintiff to be precluded from more than a unique, job-specific requirement. Because the petitioner failed to present any evidence on this crucial issue, he failed to meet a properly articulated burden of production on motion for summary judgment.

Nothing in these cases justifies the heightened scrutiny currently being demanded of ADA plaintiffs by the lower courts. Read properly, the Court's precedents demonstrate a straightforward, commonsense approach to the definition of disability. No extensive statistical analysis is required. No submission of expert reports and testimony is necessary. Rather, in order to raise a disputed issue of material fact as to whether or not a plaintiff meets the statutory definition, plaintiffs need only produce some credible evidence that their impairment limits them in more than an isolated, specialized, or unique situation. More times than not, that determination can be based on common sense and a principled inquiry into the facts as presented.

III. THE SIXTH CIRCUIT DECISION BELOW DEMONSTRATES AN APPROPRIATE APPLICATION OF THE SUMMARY JUDGMENT STANDARD AND SHOULD BE AFFIRMED.

1. In the decision below, the Sixth Circuit engaged in an appropriate analysis of the evidence presented by the Respondent and found that she had raised a triable issue as to her substantial limitation in the major life activity of performing manual tasks. In reaching that conclusion, the appellate court followed this Court's instructions in regard to both the role of the courts on summary judgment, and the proper application of the definition of disability in the ADA.

At the district court, the Respondent proffered the following evidence in her effort to satisfy her burden and raise a triable issue as to her status as disabled.

> With regards to the major life activity of performing manual tasks, [Respondent's] evidence is that she "has been restricted by both the [Petitioner's] doctors and her personal doctor from performing manual tasks that require repetitive movement of her upper extremities or any work that must be performed above her chest level." [Citation]. In addition, she is "precluded from any manual task that requires rotary or lateral movements of her head and neck. . . ."

Pet. App. 36a (citations omitted). Instead of viewing this evidence in the light most favorable to the Respondent, *see Reeves, supra,* 530 U.S. at 150 (citations omitted), the district court engaged in a forbidden fact-finding, evidence-weighing exercise. *Id.* at 150-51. The district court completely disregarded common sense and even used the EEOC regulations to erect an artificial barrier. In particular, the district court faulted the Respondent for purportedly not presenting evidence of the nature, severity, and duration of her impairment. Pet. App. 36a (citing 29 C.F.R. § 1630.2(j) (2)). However, the district court disregarded evidence that it had cited previously. *See* Pet. App. 25a (listing *permanent* work restrictions imposed by the Respondent's physician). Accordingly, the district court failed to review the record, "taken as a whole." *Reeves, supra*, 530 U.S. at 150 (citing *Matsushita, supra,* 475 U.S. at 587). When considered in the light most favorable to the Respondent, there can be no doubt that the above-cited evidence is sufficient to raise a disputed issue of material fact as to the question of whether the Respondent was substantially limited in the major life activity of performing manual tasks.

Similarly, the district court rejected the Respondent's evidence that she is substantially limited in the major life

activity of working. Pet. App. 37a-42a. In support of her claim, the Respondent submitted the expert report of a vocational rehabilitation specialist. *Ibid.* She also relied upon her medical records and permanent work restrictions to raise a triable issue as to her substantial limitation. *Id.* at 38a n.4. As with her evidence regarding the performing of manual tasks, the district court engaged in a forbidden fact-finding, evidence-weighing exercise. *Reeves, supra*, 530 U.S. at 150-51. The expert report submitted by the Respondent opined that her physical impairment restricted her from 50% to 55% of available jobs. Pet. App. 38a. Had the district court properly drawn all inferences from this report in favor of the Respondent, *Reeves, supra,* 530 U.S. at 150 (citations omitted), it would have easily met the standard of "substantial limitation." This Court's ADA rulings mandate that result. *Bragdon, supra*, 524 U.S. at 641 (holding that an 8% likelihood of transmitting HIV during gestation and childbirth was sufficient to carry the ultimate burden of persuasion that the plaintiff was substantially limited in the major life activity of reproduction, instructing that the Act considers "substantial limitations on major life activities, not utter inabilities."); *see also ibid.* ("When significant limitations result from the impairment, the definition is met even if the difficulties are not insurmountable.") The same would be true for the evidence derived from the medical documentation and testimony submitted by the Respondent. Pet. App. 38a, n.4; *Arline*, 480 U.S. 276, 281 (finding that the plaintiff had presented sufficient evidence to support a favorable jury finding where the only evidence submitted was testimony of a physician who reviewed the plaintiff's medical records).

The Sixth Circuit reversed. In so doing, the court properly recognized that it must "take the facts in the light most favorable to the plaintiff". Pet. App. 2a; *see also id.* at 4a. Ultimately, the panel concluded that

> [T]he plaintiff's set of impairments to her arms, shoulders and neck are sufficiently disabling *to allow the factfinder to find* she crosses the threshold into the protected class of individuals under the ADA who must be accorded reasonable accommodation.

Id. at 4a (emphasis added). The appellate court drew on common sense in stating that "[h]er ailments are analogous to having missing, damaged or deformed limbs . . . ." Pet. App. 4a. The Sixth Circuit further found that "the duration of [the Respondent's] impairment, as well as the permanent impact of it, are *inferable* from the permanent work restrictions prescribed by [her] treating physicians. *Id.* at 4a-5a (emphasis added). This statement represents the proper role of the court on summary judgment and a faithful application of that standard to the requirements of the ADA. *Reeves, supra,* 530 U.S. at 150-51 (citations omitted).

2. In its submission on the merits, the Petitioner asks this Court not only to endorse the district court's ruling, but further seeks to have this Court adopt a standard that raises the burden for all ADA plaintiffs even higher.

To begin, the Petitioner baldly asserts that in order to demonstrate a substantial limitation in the major life activity of performing manual tasks, plaintiffs must prove that they are "*severely restricted* from using their hands to perform a broad range of *basic functions* to meet the *essential demands* of everyday life." Pet. Br. at 12-13 (emphasis added). The Petitioner cites absolutely no authority for this proposition. There is a simple reason for that omission: none exists. The standard articulated by the Petitioner is found nowhere in the statute, implementing regulations, regulatory interpretation, legislative history, or case law. Indeed, it would be hard to imagine any plaintiff meeting this standard who could then go on to prove, as is a plaintiff's burden, that he or she is qualified to perform the

essential functions of the job they hold or desire. 42 U.S.C. § 12111(9). Rather, the Petitioner's standard would only expand the well-known Catch-22 (a.k.a "the double squeeze") of the ADA: that a plaintiff must be "disabled enough" to come within the confines of the Act, but not "too disabled" so that he or she cannot work at all.

The Petitioner then goes on to articulate four standards that are equally unsubstantiated by the plain meaning of the statute. Specifically, the Petitioner asserts that the ADA only covers those who (1) are "constrained from performing the basic functions in life"; (2) are "significantly restricted in important life functions"; (3) "have significant restrictions on fundamental life activities"; and (4) are "truly disabled." Pet. Br. at 22, 24, 26, 29. The Petitioner's strained attempts at gleaning support for these propositions from the legislative history and this Court's prior decisions should be rejected. Again, this Court has made it crystal clear, the ADA is about "substantial limitations, not utter inabilities." *Bragdon, supra,* 524 U.S. at 641. Adopting the Petitioner's unsupported propositions would only serve to create such a high barrier for ADA plaintiffs that the plain meaning and true purpose of the Act will be thwarted.

CONCLUSION

Simply put, the lower courts have not faithfully applied the overarching principles of the ADA. Indeed, those courts have succeeded in erecting a further barrier to the full societal participation of people with disabilities.

The Petitioner strongly urges this Court to reverse course and permit lower court judges to substitute their own judgment for that of a jury. Such wide-ranging power is not justified either by this Court's teachings on summary judgment standards or by its prior interpretations of the

statutory definition of disability. Accordingly, this Court should reject the Petitioner's invitation. Instead, this Court should not only affirm the Sixth Circuit's ruling in this case, but take the opportunity to reinforce the standards for considering a nonmoving plaintiff's burden in responding to motions for summary judgment.

Respectfully submitted,

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No. 00-1089

IN THE

Supreme Court of the United States

TOYOTA MOTOR MANUFACTURING, KENTUCKY, INC.,
Petitioner,

v.

ELLA WILLIAMS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR THE JUDGE DAVID L. BAZELON CENTER FOR MENTAL HEALTH LAW *ET AL.* AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

(Additional *Amici* Listed on Inside Cover)

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The American Occupational Therapy Association ("AOTA")

The Arc of the United States

The Association on Higher Education And Disability ("AHEAD")

The Epilepsy Foundation®

HalfthePlanet Foundation

The Judge David L. Bazelon Center for Mental Health Law

Lambda Legal Defense and Education Fund, Inc.

The National Association of Protection and Advocacy Systems ("NAPAS")

The National Association of Rights Protection and Advocacy ("NARPA")

The National Health Law Program ("NHeLP")

The National Mental Health Association

The National Mental Health Consumers' Self-Help Clearinghouse

The Polio Society

Self Help for Hard of Hearing People

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BRIEF FOR THE JUDGE DAVID L. BAZELON CENTER FOR MENTAL HEALTH LAW *ET AL.* AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT[1]

INTEREST OF THE AMICI CURIAE

The sixteen organizations joining this brief have worked for years on behalf of persons with disabilities and have brought, supported, or participated in numerous lawsuits on behalf of such persons. They all have strong institutional interests in the correct interpretation of the Americans with Disabilities Act and in vindicating the principles of equality and fair opportunity embodied in that Act. Their interests are described in more detail in the Appendix to this brief.

[1] No counsel for any party had any role in authoring this brief, and no persons other than the *amici curiae* and their counsel made any monetary contribution to its preparation or submission. Written consents from the parties to the filing of this brief are on file with the Clerk of the Court.

INTRODUCTION

This case concerns the proper interpretation of the term "disability" as that term is used in the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. § 12101 *et seq*. In particular, it involves the proper interpretation of what it means for an individual's physical or mental impairment to "substantially limit[] one or more of the major life activities of such individual" within the meaning of § 12102(2)(A), and what it means for such impairment to "substantially limit" the major life activities of "performing manual tasks" and "working" within the meaning of the EEOC regulations concerning Title I of the ADA, 29 C.F.R. § 1630.2(i) and (j).

Respondent Ella Williams began employment in 1990 as an assembly line worker in an automobile manufacturing plant operated by Petitioner Toyota Motor Manufacturing, Kentucky, Inc. As more fully explained in the briefs of the parties, she developed bilateral carpal tunnel syndrome in her wrists and bilateral tendinitis in her neck, shoulders, and arms, apparently as a result of having to grip vibrating pneumatic tools to perform her job, and consulted a physician who imposed certain limitations on her manual activities. The resulting limitations apparently disqualified her from most of the assembly jobs in the plant, and Toyota eventually accommodated her by assigning her to the unit of the assembly line known for having "the 'easiest jobs' at [the plant]," Pet. Br. 5, where Ms. Williams, in a further accommodation, rotated each week between the two least physically taxing work stations. After three years, Toyota required her to rotate to a third job station, where she was required to apply oil to portions of the cars on the assembly line, using a wooden-handled sponge, and to work at regular intervals with her hands and arms above shoulder height. Ms. Williams believed that she could continue to work if her rotation was limited to the two jobs she had been performing for the past three years. The matter was not resolved to her satisfaction, however, and her employment ended soon after. Ms. Williams's

condition also limited her outside of work. While this matter is dealt with more fully in the briefs of the parties, Ms. Williams gave several examples of such limitations in her deposition testimony, including the following: "Raising my arms and sometimes getting dressed, I can't reach my arms like I need to anymore," and "I try to avoid any driving due to driving causes me pain." J.A. 32, 33.

When Ms. Williams sued Toyota under Title I of the ADA, the district court granted Toyota's motion for summary judgment. With respect to the major life activity of performing manual tasks, the court found Ms. Williams's evidence of substantial limitations insufficient, stating specifically that her claim was "irretrievably contradicted by [her] continual insistence that she could perform the tasks in assembly and paint inspection without difficulty; positions requiring manual tasks." Pet. App. 36a. With respect to the major life activity of working, the court found dispositive the well-established principle that to be considered substantially limited in that major life activity, an ADA plaintiff "must show more than an inability to perform a single job or the job of her choice." Pet. App. 37a. The court did not think Ms. Williams had done so, in spite of her conceded inability to perform any of the assembly line jobs in the plant other than the two easiest jobs in the easiest division.

The court of appeals reversed, addressing only the major life activity of performing manual tasks. The grounds for its decision are, to put it bluntly, not clearly stated. In light of the contentious view of this decision taken by Toyota, it is useful to describe the decision in some detail.

The court first concluded, "from the language of the Act, the EEOC's interpretation and the Supreme Court's analysis in *Sutton* [v. *United Air Lines, Inc.*, 527 U.S. 471 (1999)]," that "in order to be disabled the plaintiff must show that her manual disability involves a 'class' of manual activities affecting the

ability to perform tasks at work." 224 F.3d 840, 843 (6th Cir. 2000), Pet. App. 4a. Petitioner makes much of this statement, contending that the court intended in this statement to encapsulate or define the entire test for determining if one is substantially limited in the major life activity of performing manual tasks. *E.g.*, Pet. Br. 15-16. In our view, the sentence is of an introductory nature and does not bear the weight Petitioner places upon it. To the contrary, the heart of the court's analysis is found in the next paragraph of the opinion, where the court stated that, "taking the evidence in the light most favorable to the plaintiff, * * * [h]er ailments are analogous to having missing, damaged or deformed limbs that prevent her from doing the tasks associated with certain types of manual assembly line jobs, manual product handling jobs and manual building trade jobs (painting, plumbing, roofing, etc.) that require the gripping of tools and repetitive work with hands and arms extended at or above shoulder levels for extended periods of time." 224 F.3d at 843, Pet. App. 4a. It found these limitations to meet the statutory test, even though "Williams can perform a range of isolated, non-repetitive manual tasks performed over a short period of time, such as tending to her personal hygiene or carrying out personal or household chores." *Id.*

The court did not determine whether Ms. Williams was substantially limited in the major life activities of lifting or working, because it had already concluded that Ms. Williams was substantially limited in performing manual tasks—requiring a remand to the district court for further proceedings. Moreover, the court took the occasion to distinguish another Sixth Circuit decision—*McKay* v. *Toyota Motor Mfg., U.S.A., Inc.*, 110 F.3d 369 (6th Cir. 1997) (concerning the major life activity of "working")—on the ground that *McKay* had failed to take account of *Sutton*'s "recogni[tion]" that "'there may be some conceptual difficulty in defining 'major life activities' to include work, for it seems to argue in a circle to say that if one

is excluded, for instance, by reason of [an impairment, from working with others] . . . then that exclusion constitutes an impairment, when the question you're asking is, whether the exclusion itself is by reason of handicap.'" 224 F.3d at 843, Pet. App. 5a, quoting *Sutton*, 527 U.S. at 492 (brackets and ellipsis in original). The court repeated in the next paragraph that the "'difficult concept' of working" is properly viewed as a "'last resort.'" 224 F.3d at 844, Pet. App. 5a. "The concept of 'manual tasks' requires a disability analysis to come before the life activity of working is considered and includes looking at a person's ability to use their limbs in a way called for by *a broad range or class of manual activities* that, as in this case, require the gripping of tools and arms to be kept overhead or at shoulder level repetitively for an extended period of time." 224 F.3d at 844, Pet. App. 5a–6a (emphasis added).

The court described Ms. Williams's claim as including "the rather simple concept that she is disabled as to performing manual tasks because she suffers from a severe impairment to her limbs, shoulders and neck that seriously reduces her ability to perform the manual tasks that are job-related." 224 F.3d at 844, Pet. App. 5a. And the court concluded that her impairments of limbs were "sufficiently severe to be like deformed limbs and such activities affect manual tasks associated with working, as well as manual tasks associated with recreation, household chores and living generally." 224 F.3d at 844, Pet. App. 6a. In its view, this limitation met the test of the EEOC regulation, 29 C.F.R. § 1630.2(j)(1)(ii).

Accordingly, it appears reasonably clear that the court concluded that Ms. Williams's inability in "gripping of tools and [holding her] arms * * * overhead or at shoulder level repetitively for an extended period of time" meant that she was significantly limited in a "broad range or class of manual activities" and thus came within the EEOC regulation and the Act. And because the court returned more than once to the observation that Ms. Williams's impairment was like having

"missing, damaged or deformed limbs," the court clearly was not ruling for Ms. Williams either because her impairment merely "affected" her ability to work or because her impairment kept her from performing only one job or one narrow set of jobs.

SUMMARY OF ARGUMENT

While the *amici* joining this brief generally support the positions of Respondent, Ms. Williams, this brief addresses four issues raised by the case that are of general importance to the disability community.

First, *amici* take issue with the Sixth Circuit's statement that "in order to be disabled the plaintiff must show that her manual disability involves a 'class' of manual activities affecting the ability to perform tasks *at work*." 224 F.3d at 843, Pet. App. 4a (emphasis added). Neither the language of the statute nor the EEOC regulations—which are not challenged in this case—point to such a limitation in addressing any major life activity other than working. While this limitation may not prejudice Ms. Williams here, it will prejudice other ADA plaintiffs and should be corrected.

Second, *amici* take issue with the very limited notion of the major life activity of "performing manual tasks" that Petitioner urges. For an individual to be "disabled" under the ADA with respect to the major life activity of performing manual tasks, he or she must be "substantially limit[ed]" in the performance of manual tasks as compared to the average person in the general population. 29 C.F.R. § 1630.2(j)(1), Pet. Br. 18a–19a. Petitioner, however, seeks to impose a much higher standard, requiring ADA plaintiffs to demonstrate that they are "*severely restricted* from using their hands to perform a *broad range* of *basic functions* needed to meet the *essential demands of everyday life*." Pet. Br. 12–13 (emphasis added). That higher standard is not grounded in the ADA, the EEOC regulations, or the interpretive guidance, and should therefore be rejected. The

ADA requires consideration of *all* manual tasks that the average person can perform, including both tasks performed at work and outside of work. In addition, and contrary to Petitioner's claim, consideration of manual tasks performed solely at work does not circumvent the requirements of the different major life activity of "working." Although the major life activities of "performing manual tasks" and "working" sometimes overlap in scope, they are two separate major life activities, which protect individuals with different impairments. Under these standards, the Sixth Circuit correctly concluded that a reasonable jury could find that Ms. Williams was substantially limited in the major life activity of performing manual tasks.

Third, *amici* ask the Court to revisit the passage in *Sutton* that apparently discouraged the Sixth Circuit from addressing the major life activity of "working" and has given pause as well to a number of other lower courts. This is the passage in which the Court mentioned certain "conceptual difficult[ies]" with the major life activity of "working" and suggested that it may be "circular" to define "working" as a major life activity. 527 U.S. at 492. To the contrary, there is no general conceptual difficulty with defining "working" as a major life activity. The EEOC regulations clarify the definition in a manner that eliminates any perceived circularity. Moreover, it would defy common sense to say that an individual whose physical or mental impairment makes it difficult to find employment is not significantly limited in a "major life activity." The protection provided by the major life activity of working is an important one for individuals with disabilities and is clearly within the language and purpose of the ADA.

Finally, *amici* urge the Court not to accept the invitation of Petitioner and some *amici* to limit the definition of "disability" in order to spare employers the perceived burdens of defending against ADA Title I claims on the additional grounds that the accommodations that would be necessary to qualify the individual for the job are unreasonable or would impose an

undue hardship. Contrary to the claim of one *amici* and certain commentators, such issues are indeed amenable to disposition on summary judgment. In any event, the perceived burdens of winning ADA cases on those additional grounds is an insufficient reason to conclude that Congress adopted the very limited reading of "disability" urged by Petitioner and its *amici*. Congress manifestly had a broader view of the term.

ARGUMENT

I. An ADA Plaintiff Should Not Be Required To Show That Her Manual Disability Affects Her Ability To Perform Tasks at Work.

The Sixth Circuit introduced its discussion of Ms. Williams's claim that she was significantly limited in the major life activity of performing manual tasks by saying that "in order to be disabled the plaintiff must show that her manual disability involves a 'class' of manual activities affecting the ability to perform tasks at work." 224 F.3d at 843, Pet. App. 4a. As explained in the Introduction, *amici* doubt that this statement was meant to set forth a complete statement of the Sixth Circuit's understanding of the test for evaluating limitations on performing manual tasks. But to the extent that the Sixth Circuit intended to say that the evaluation must focus exclusively on work-related manual tasks, *amici* agree with the United States that the Sixth Circuit applied the wrong standard. See Brief for the United States as *Amicus Curiae* at 17–21.

The ADA defines a "disability" with respect to an individual as "a physical or mental impairment that substantially limits one or more of the major life activities of such individual." 42 U.S.C. § 12102(2). There is no way to read these words as limiting the inquiry to whether individuals are impaired in their ability to perform tasks at work.

The EEOC regulations—which are not challenged in this proceeding—define "major life activities" as "functions such as

caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 29 C.F.R. § 1630.2(i), Pet. Br. 18a. Because "working" is defined as a separate major life activity, it makes no sense to confine any of the other major life activities to a subset of working activities. Moreover, in defining the term "substantially limits," the EEOC regulations, which we discuss more fully below, do not instruct courts to look only at work-related activities. 29 C.F.R. § 1630.2(j)(1), Pet. Br. 18a–19a.

There is, of course, substantial overlap among the various major life activities that the EEOC listed. For example, blindness both impairs an individual's ability to do many non-work-related activities that others do without difficulty and affects the individual's ability to perform many different jobs. There is nothing in the EEOC regulations or in common sense, however, that leads to the conclusion that individuals must show that they are significantly limited in the ability to work to show that they are significantly limited in the other listed major life activities. Nor is "performing manual tasks" peculiar in this respect. As we explain more fully below, performing manual tasks is a major life activity in its own right. While it may substantially overlap with "working," it refers to limitations on manual activities outside of work as well as those one might perform at a job.

This Court has already rejected the contention that individuals must establish that their limitations "have a public or economic character" in order to establish that they are substantially limited in a major life activity. In *Bragdon* v. *Abbott*, 524 U.S. 624 (1998), where it held that reproduction is a major life activity, this Court stated: "The inclusion of activities such as caring for one's self and *performing manual tasks* belies the suggestion that a task must have a public or economic character in order to be a major life activity for purposes of the ADA." 524 U.S. at 639 (emphasis added).

In short, as the United States stated in its brief:

> "With the obvious exception of 'working,' proof that an individual is substantially limited in one of the major life activities identified in the regulations does not require a showing that his impairment affects job performance. In particular, an individual whose impairment substantially limits his ability to perform manual tasks has a 'disability' within the meaning of the ADA, even if the tasks that the individual is unable to perform all occur off the job and the impairment does not affect his 'ability to perform tasks at work.'" Brief for the United States as *Amicus Curiae* at 18–19.

Because the Sixth Circuit's apparent error on this point did not prejudice Ms. Williams, who prevailed anyway, there is no reason to remand the case because of this error. The point is sufficiently important, however, to deserve correction by this Court.

II. An Individual Is Disabled Under the ADA When That Individual Is Able To Perform Manual Tasks Only at a Level Substantially Below the Level at Which the Average Person in the General Population Can Perform Such Tasks.

A. To determine whether an individual is disabled under the ADA, a court must determine whether that individual is substantially limited in the performance of a major life activity when compared to the ability of the average person in the general population to perform that major life activity. According to the EEOC regulations—which are not challenged in this proceeding—a person is "substantially limit[ed]" in the performance of a major life activity if he or she is:

> "(i) Unable to perform a major life activity that the *average person in the general population* can perform; or

> (ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity *as compared to* the condition, manner, or duration under which *the average person in the general population* can perform that same major life activity." 29 C.F.R. § 1630.2(j)(1), Pet. Br. 18a–19a (emphasis added).[2]

This comparison of an ADA plaintiff with the average person in the general population is buttressed by the requirement that courts determine whether a plaintiff is "disabled" under the ADA on an individualized, rather than a categorical, basis. See *Sutton* v. *United Air Lines, Inc.*, 527 U.S. 471, 483 (1999) ("[W]hether a person has a disability under the ADA is an individualized inquiry."). Therefore, courts must determine whether a particular ADA plaintiff is "substantially limit[ed]" in the major life activity of "performing manual tasks" by inquiring whether *that plaintiff* is restricted in the performance of manual

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[2] See also 29 C.F.R. pt. 1630 App. § 1630.2(i), Pet. Br. 31a (a major life activity is an activity "that the *average person in the general population* can perform with little or no difficulty"); *id.* § 1630.2(j), Pet. Br. 33a ("[A]n impairment is substantially limiting if it significantly restricts the duration, manner or condition under which an individual can perform a particular major life activity *as compared to the average person in the general population's* ability to perform that same major life activity."); *id.*, Pet. Br. 34a ("An individual is not substantially limited in a major life activity if the limitation * * * does not amount to a significant restriction *when compared with the abilities of the average person.*") (all emphasis added). This notion comes directly from the reports on the bills that became the ADA. S. Rep. No. 101-116, at 23 (1989) ("A person is considered an individual with a disability for purposes of the first prong of the definition when the individual's important life activities are restricted as to the conditions, manner, or duration under which they can be performed in comparison to most people."); H.R. Rep. No. 101-485, pt. 2, at 52 (1990) (same).

tasks to a level substantially below that at which the average person in the general population can perform such tasks.[3]

Toyota seeks to modify this inquiry and to require ADA plaintiffs to demonstrate that, with respect to the major life activity of performing manual tasks, they are "*severely restricted* from using their hands to perform a *broad range* of *basic functions* needed to meet the *essential demands of everyday life*." Pet. Br. 12–13 (emphasis added). There is simply no support, however, in the text of the ADA, the EEOC regulations, or the interpretive guidance for imposing this different standard. Toyota has crafted this hurdle out of whole cloth. As discussed above, an individual is disabled under the ADA when he or she is significantly restricted in the performance of a major life activity—including the major life activity of performing manual tasks—as compared to the average person in the general population, even if such impairment does not rise to the level that Toyota seeks to impose.[4]

[3] An example of this individualized decision-making is the Eleventh Circuit's decision in *Chanda* v. *Engelhard/ICC*, 234 F.3d 1219 (11th Cir. 2000). In *Chanda*, the court found an individual not disabled under the ADA because, although tendinitis in his forearms rendered him unable to perform certain manual tasks (such as typing or cutting foamboard), in the court's view that condition did not substantially limit his ability to perform manual tasks. *Id.* at 1223. The court specifically distinguished the facts of that case from the Sixth Circuit's decision in this case, "recognizing the case-by-case nature of the disability," and concluding that the limitations at issue in that case resulted in a lesser level of impairment than Ms. Williams's condition, which impacted her wrists, arms, shoulders, and neck. *Id.* at 1224.

[4] Lower federal courts have adopted this comparison, and not Toyota's proposed standard, as the relevant inquiry. *See, e.g.*, *Maziarka* v. *Mills Fleet Farm, Inc.*, 245 F.3d 675, 680 (8th Cir. 2001) (severe irritable bowel syndrome limited major life activities, including performance of manual tasks, when compared to the average person); *Emerson* v. *Northern States Power Co.*, No. 00-3746, 2001 U.S. App. LEXIS 14252, at *12–13 (7th Cir. June 26, 2001) (fact issue sufficient to defeat summary judgment concerning whether individual's learning difficulties substantially limited that plaintiff as compared to the average person in the general population).

Toyota also mistakenly argues that an ADA plaintiff's ability to perform a range of manual tasks means that he or she cannot be "substantially limit[ed]" in the major life activity of performing manual tasks. See Pet. Br. 3 (even though Ms. Williams was substantially limited in the performance of a "range of manual tasks associated with an assembly line job," she "could perform almost all other manual tasks"). This method of analysis, however, turns the ADA on its head. The ADA is concerned with an individual's *disabilities*, not his or her *abilities*—of which every disabled individual undoubtedly has many.[5] This distinction is critically important with respect to the major life activity of performing manual tasks because, unlike other major life activities, such as seeing or hearing, the major life activity of performing manual tasks includes many different functions. The ability to perform certain manual tasks does not negate the existence of a disability under the ADA, so long as the individual can perform manual tasks only at a level substantially below the level at which the average person in the general population can perform manual tasks.

B. There is no basis in the statute or regulations for excluding from consideration any manual task that the average person in the general population can perform when determining whether an individual is substantially limited in the major life activity of performing manual tasks. Toyota acknowledges that the ability to perform manual tasks is an important life function when it states that "[t]he reason 'performing manual tasks' is a major life activity is that the ability to use one's hands to

[5] *E.g.*, *EEOC* v. *Sears, Roebuck & Co.*, 233 F.3d 432, 435, 438 (7th Cir. 2000) (rational jury could conclude that individual who could walk short distances for short periods of time was nonetheless substantially limited in the major life activity of walking).

accomplish basic functions is an undeniably important and significant aspect of life." Pet. Br. 14. Toyota errs, though, by extrapolating to the conclusion that only manual tasks that are at "the heart of what makes the ability to perform manual tasks a major life activity" are relevant to the "disability" inquiry under the ADA. *Id.* This conclusion is unsupportable.

The EEOC regulations do not establish that there are relevant and irrelevant manual tasks or distinguish between core and non-core manual tasks. Under the ADA's standard of comparison, all manual tasks that the average person in the general population can perform without significant difficulty are relevant in determining whether an individual is disabled under the ADA. Those manual tasks that the average person cannot perform (*e.g.*, playing the piano at the level of a concert pianist) are obviously excluded from consideration.

It is also clear that there is no basis for categorically excluding manual tasks performed solely at work from consideration when determining whether an individual is substantially limited in the major life activity of performing manual tasks. See Brief for the United States as *Amicus Curiae* at 21 ("[A] proper determination whether a plaintiff is substantially limited in 'performing manual tasks' would include an assessment of his ability (or inability) to perform manual tasks outside the workplace as well as those on the job."). Obviously, many jobs require individuals to perform manual tasks, and the EEOC regulations do not distinguish between work-related manual tasks and non-work manual tasks for purposes of coverage under the ADA.[6] Moreover, it would be

[6] Even those courts that have found particular plaintiffs not disabled under the ADA have considered work-related manual tasks relevant to determine whether an individual is substantially limited in the performance of manual tasks. *E.g.*, *Shpargel* v. *Stage & Co.*, 914 F. Supp. 1468, 1474 (E.D. Mich. 1996) (plaintiff who could perform manual tasks at work held not disabled under the ADA); *Battle* v. *Power Logistics*, No. 99 C 5872,

an artificial distinction to require that to be limited in the major life activity of performing manual tasks, one must demonstrate limitation in some manual task or tasks outside of work, in addition to manual tasks at work (regardless of how many or how significant they are). The more natural interpretation, and one that is consistent with the regulations, is that all manual tasks are relevant to the basic inquiry, and any individual who is significantly limited in the performance of such tasks as compared to the average person in the general population is disabled with respect to the major life activity of performing manual tasks.

Toyota attempts to avoid this natural conclusion by arguing that the ADA extends to impairments that limit a major life activity, not impairments that merely limit a "subset" of a major life activity—in this case the major life activity of performing manual tasks. Pet. Br. 12, 16. This argument begs the question: at what point does an individual's substantial impairment in the performance of a few manual tasks rise to the level of impairing the general category of "performing manual tasks" as compared to the average person in the general population? The answer is that one who is able to perform manual tasks only at a level substantially below the level at which an average person can perform such tasks is disabled under the ADA. That inquiry may pose challenging factual questions when an individual is limited in only some manual tasks, but that challenge is analytically similar to the challenge in assessing a partial limitation with respect to any major life activity. In any event, whether the limitation applies to a "subset" or not does not advance the inquiry.

2000 U.S. Dist. LEXIS 16872, at *17 (N.D. Ill. Nov. 1, 2000) (same); *Puoci* v. *City of Chicago*, 81 F. Supp. 2d 893, 897 (N.D. Ill. 2000) (individual who could perform his job, which included performing manual tasks, not disabled).

C. Recognizing that an individual may be disabled because he or she is limited in the performance of manual tasks solely at work does not circumvent or render irrelevant the major life activity of "working." Toyota argues (at 19–21) that finding an individual disabled under the ADA solely on the basis of limitations on work-related manual tasks would "make[] an end-run" around the requirement that, with respect to the major life activity of "working," an individual must be "significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes." 29 C.F.R. § 1630.2(j)(3)(i), Pet. Br. 19a. At its most basic, this argument ignores the fact that "performing manual tasks" and "working" are two separate major life activities, as specified by the EEOC regulations. See 29 C.F.R. § 1630.2(i), Pet. Br. 18a. There is no basis for restricting the scope of one major life activity simply because of the construction that has been given to another major life activity.

Moreover, Toyota's argument ignores the very real distinction between being disabled by being substantially limited in working and being disabled by being substantially limited in the performance of manual tasks. Some people may be limited in performing manual tasks (whether at work, outside of work, or both), but not limited in working—such as those whose jobs do not require significant performance of manual tasks (*e.g.*, a singer, an educator, or a lawyer). Other disabled individuals, however, may be substantially limited in working, but not in performing manual tasks (*e.g.*, a person with severe mental retardation). Therefore, even if the major life activity of performing manual tasks permits an individual to be deemed disabled under the ADA because the individual is significantly limited in performing the manual tasks required by the kind of job he or she holds, this construction does not compromise the standards for being substantially limited in the different major life activity of working. Moreover, while the major life activities of performing manual tasks and working might in some cases

overlap in scope—as do other major life activities such as seeing and walking, or learning and working—the basic inquiry remains the same: whether the individual can perform manual tasks at a level substantially equivalent to the level at which the average person in the general population can perform manual tasks.

D. While the application of ADA rules to Ms. Williams's case is fully developed in the briefs of the parties, several considerations point to the conclusion that the court of appeals correctly held that a reasonable jury could conclude that when compared to the average person in the general population, Ms. Williams was "substantially limited" in the major life activity of performing manual tasks. Three factors used to assist in the determination of whether an individual is "substantially limited" in a major life activity (as compared to the average person) are "(i) The nature and severity of the impairment; (ii) The duration or expected duration of the impairment; and (iii) The permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment." 29 C.F.R. § 1630.2(j)(2), Pet. Br. 19a; *cf.* 29 C.F.R. pt. 1630 App. § 1630.2(j), Pet. Br. 32a ("temporary, non-chronic impairments of short duration, with little or no long term or permanent impact, are usually not disabilities" including "broken limbs, sprained joints, concussions, appendicitis, and influenza"). Ms. Williams suffered from carpal tunnel syndrome and from tendinitis in her hands, arms, shoulders, and neck. Pet. App. 2a (court of appeals opinion). The court evaluated the effect of this condition on Ms. Williams when it found her condition to be "severe," and classified it as "analogous to having missing, damaged or deformed limbs." Pet. App. 2a, 4a.[7] Not only did Ms. Williams's condition substantially limit her in the

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[7] See 29 C.F.R. pt. 1630 App. § 1630.2(j), Pet. Br. 32a ("The determination of whether an individual has a disability is not necessarily based on the name or diagnosis of the impairment the person has, but rather on the effect of that impairment on the life of the individual.").

performance of manual tasks at work—including "gripping of tools and repetitive work with hands and arms extended at or above shoulder levels for extended periods of time," Pet. App. 4a, but the record evidence indicates that she was also limited in the performance of manual tasks outside of work, including dressing, driving, performing household chores (such as vacuuming), and gardening. J.A. 32, 35–36, and 39.[8] Further, Ms. Williams's condition was lengthy in duration—she developed carpal tunnel syndrome in 1991, J.A. 11, and by December 6, 1996, Ms. Williams's last day of work with Toyota, her condition had become so severe that "she was placed under a *no work of any kind* restriction by several of her treating physicians." Pet. App. 28a (district court opinion).[9] The court of appeals therefore correctly held that a reasonable jury could conclude that Ms. Williams was substantially limited in the major life activity of performing manual tasks.

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[8] Toyota notes that the district court rejected Ms. Williams's claims that these activities were "major life activities." Pet. Br. 7 n.2. But the District Court did not hold that these activities were not "manual tasks" or that Ms. Williams's condition did not in fact limit her performance of these manual tasks.

[9] The duration of Ms. Williams's carpal tunnel syndrome and tendinitis places her condition squarely within the holdings of the lower federal courts on this issue. *Compare Quint* v. *A.E. Staley Mfg. Co.*, 172 F.3d 1, 11 (1st Cir. 1999) (plaintiff substantially limited in working because her carpal tunnel syndrome was "recurrent and permanent"), *and Wellington* v. *Lyon County Sch. Dist.*, 187 F.3d 1150, 1155 (9th Cir. 1999) (permanent carpal tunnel syndrome sufficient to create question of fact concerning substantial limitation on working), *with Battle* v. *Power Logistics*, No. 99 C 5872, 2000 U.S. Dist. LEXIS 16872, at *16 (N.D. Ill. Nov. 1, 2000) (wrist injury expected to last 2 to 4 weeks not substantially limiting), *and Wilmarth* v. *City of Santa Rosa*, 945 F. Supp. 1271, 1276 (N.D. Cal. 1996) (temporary carpal tunnel syndrome held not disabling).

III. There Is No General Conceptual Difficulty in Treating "Working" As a "Major Life Activity."

A. In explaining why it chose not to address Ms. Williams's argument that she was substantially limited in the major life activity of working, the court of appeals relied on a passage from *Sutton* to the effect that there may be "conceptual difficult[ies]" in defining "major life activities" to include work. 224 F.3d at 843, Pet. App. 5a. In the passage in question, the Court in *Sutton* began by observing that, because the parties in that case accepted "that the term 'major life activities' includes working," it would not "determine the validity" of the EEOC regulation that specifically includes "working" in the list of "major life activities." 527 U.S. at 492, referring to 29 C.F.R. § 1630.2(i), Pet. Br. 18a. It then continued:

> "We note, however, that there may be some conceptual difficulty in defining 'major life activities' to include work, for it seems 'to argue in a circle to say that if one is excluded, for instance, by reason of [an impairment, from working with others] . . . then that exclusion constitutes an impairment, when the question you're asking is, whether the exclusion itself is by reason of handicap.' Tr. of Oral Arg. in *School Bd. of Nassau Co.* v. *Arline*, O.T. 1986, No. 85-1277, p. 15 (argument of Solicitor General)." *Sutton*, 527 U.S. at 492 (brackets and ellipsis in original).

The Court went on to suggest that the EEOC shared its concern about categorizing "working" as a "major life activity," adding:

> "Indeed, even the EEOC has expressed reluctance to define 'major life activities' to include working and has suggested that working be viewed as a residual life activity, considered, as a last resort, *only* '[i]f an individual is not substantially limited with respect to *any other* major life activity.' 29 CFR pt. 1630, App. § 1630.2(j) (1998) (emphasis added) ('If an individual is

substantially limited in *any other* major life activity, no determination should be made as to whether the individual is substantially limited in working' (emphasis added))." 527 U.S. at 492.

The disability groups joining this *amicus* brief are concerned that this passage will discourage lower courts from addressing the major life activity of "working" at all (as it did the Sixth Circuit) or will encourage them to limit the cases in which they find that an impairment substantially limits the major life activity of "working" in ways not justified by the text of the ADA, the language of the regulations and guidance documents, and the manifest purposes of the ADA. Accordingly, we urge the Court to clarify what it meant by this passage or modify the passage and thereby eliminate the suggestion that there is a general "conceptual difficulty" involved in identifying "working" as a major life activity for purposes of identifying which individuals are "disabled" under the ADA.

Dispelling the notion of a "conceptual difficulty" begins with placing *Sutton*'s quotation from the former Solicitor General's oral argument in *Arline* in the context of that case. The issue in *Arline* was whether an elementary school teacher fired for having contagious tuberculosis had a claim under § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794—that is, whether she was "handicapped," was "otherwise qualified," and had been discharged "solely by reason of [her] handicap." *School Bd. of Nassau County* v. *Arline*, 480 U.S. 273, 278–79 (1987). In the passage in question, the Solicitor General was not questioning whether "working" was a "major life activity" for purposes of § 504. The question to which the Solicitor General responded was the following: "Is employment a major life activity? Or association with other people?" Tr. of Oral Arg. in *School Bd. of Nassau County* v. *Arline*, O.T. 1986, No. 85-1277, p. 15. He answered, without equivocation, "Those are all major life activities." *Id.* He then continued, in the passage partially quoted by the Court:

"But it would be to argue in a circle to say that if one is excluded, for instance, by reason of contagiousness, from associating with others, then that exclusion constitutes an impairment, when the question you're asking is, whether the exclusion itself is by reason of handicap.

"That's a totally circular argument which lifts itself by its bootstraps. The impairment has got to be in respect to an activity which is defined and considered apart from the exclusionary action which is the subject of the lawsuit, of the complaint." *Id.* at 15-16.

Although it is difficult to make precise sense of a statement in the give-and-take of oral argument, the Solicitor General appears to have been saying no more than the following: it would be circular to say that, because one has been excluded from a single job on the basis of some characteristic (here contagiousness), this characteristic is a "handicap" for that reason alone. Or, in the language of the ADA, it would be circular to say that, because one has been excluded from a job on the basis of some physical impairment, one is "substantially limit[ed]" in the major life activity of "working" for that reason alone.

Even if such an argument would be circular, it is not one that the ADA permits or contemplates.[10] As an initial matter, it is difficult to imagine that anyone would think that exclusion from a particular job automatically means that one is "substantially

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[10] We note that the unanimous Court in *Arline* rejected the Solicitor General's "circularity" argument, stating that "[t]he argument is not circular, however, but direct." 480 U.S. at 283 n.10. As the Court explained, "Congress plainly intended the [Rehabilitation] Act to cover persons with a physical or mental impairment (whether actual, past, or perceived) that substantially limited one's ability to work." *Id.* We do not dwell further on Section 504, because, in our view, the language of the ADA and the EEOC regulations and guidance so clearly dispose of the point in the ADA context.

limit[ed]" in the major life activity of "working." The words do not readily lend themselves to that interpretation. If there were any doubt, the EEOC regulations make the point clear. "The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working." 29 C.F.R. § 1630.2(j)(3)(i), Pet. Br. 19a.

The EEOC regulations further elaborate on and explain this point by saying that one's physical impairment "substantially limits" one in the major life activity of "working" if it significantly restricts one "in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities." *Id.* The intention of the regulations is to distinguish between "a class of jobs or a broad range of jobs in various classes" and "a single, particular job." And the clear implication is that if there are a number of jobs that a plaintiff cannot perform—either a group of jobs that, in a common sense way, are viewed as a "class of jobs" or "a broad range of jobs" in different classes—the regulations then direct the court to the next question: can "the average person having comparable training, skills and abilities" perform those jobs? If so, then the plaintiff is "disabled" within the meaning of the ADA.[11]

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[11] Similarly, one may be terminated from a particular job because one has a condition that, because of an employer's uninformed or stereotyped view, is erroneously regarded by that employer as being of such a nature that it prevents one from performing a wide range of jobs. If so, one is "regarded as" having a disability under § 12102(2)(C), the "third prong" of the ADA definition of "disability." See 29 C.F.R. § 1630.2(*l*) and pt. 1630 App. § 1630.2(*l*). In neither case does termination from a particular job alone show that one comes within the definition of "disability," so there is no circularity. But in each case, the facts surrounding the particular termination may demonstrate that one is disabled or regarded as disabled within the meaning of the ADA.

Indeed, the EEOC's Interpretative Guidance provides considerable help in distinguishing between a "class of jobs" and "a single, particular job." It says:

> "Thus, an individual is not substantially limited in working just because he or she is unable to perform a particular job for one employer, or because he or she is unable to perform a specialized job or profession requiring extraordinary skill, prowess or talent. For example, an individual who cannot be a commercial airline pilot because of a minor vision impairment, but who can be a commercial airline co-pilot or a pilot for a courier service, would not be substantially limited in the major life activity of working." 29 C.F.R. pt. 1630 App. § 1630.2(j), Pet. Br. 35a.

This passage was relied upon by the Court in *Sutton* as supporting the conclusion that "the position of global airline pilot is a single job." 527 U.S. at 493. The Interpretive Guidance continues:

> "Nor would a professional baseball pitcher who develops a bad elbow and can no longer throw a baseball be considered substantially limited in the major life activity of working. In both of these examples, the individuals * * * are only unable to perform either a particular specialized job or a narrow range of jobs." 29 C.F.R. pt.1630 App. § 1630.2(j), Pet. Br. 35a–36a.

And later:

> "For example, an individual who has a back condition that prevents the individual form performing any heavy labor job would be substantially limited in the major life activity of working because the individual's impairment eliminates his or her ability to perform *a class of jobs*. This would be so even if the individual were able to perform jobs in another class, e.g., *the class of semi-skilled jobs*." 29

C.F.R. pt. 1630 App. § 1630.2(j) (emphasis added), Pet. Br. 36a.

By contrast, an individual who "has an allergy to a substance found in most high rise office buildings, but seldom found elsewhere" may not be unable to perform a "class of jobs" but would be substantially limited in the ability to perform "the broad range of jobs in various classes that are conducted in high rise office buildings within the geographical area to which he or she has reasonable access" and thus be "disabled" within the meaning of the Act. *Id.*

This Court provided further clarification in this area when it ruled, in *Murphy* v. *United Parcel Service*, 527 U.S. 516, 524–25 (1999), that the inability "to perform the job of mechanic only when that job requires driving a commercial motor vehicle," when the individual is otherwise and "generally" employable as a mechanic, does not mean that the individual is "unable to perform a class of jobs."

In short, the "circular argument" that the Solicitor General feared in *Arline* is precluded by the plain words of the ADA and the EEOC regulations and by this Court's decisions in *Sutton* and *Murphy*. As stated above, neither Toyota nor the United States challenge the EEOC regulations or the EEOC Interpretative Guidance. Nor do they seek reconsideration of *Sutton* and *Murphy*.

The EEOC regulations and Interpretative Guidance also belie any notion that the EEOC was "reluctant" to define "working" as a major life activity. The Court in *Sutton* found evidence of such "reluctance" in the following statement in the EEOC Interpretative Guidance: "If an individual is substantially limited in any other major life activity, no determination should be made as to whether the individual is substantially limited in working." 29 C.F.R. pt. 1630 App. § 1630.2(j), Pet. Br. 34a. In the very next sentence, however, the EEOC explains: "For example, if an individual is blind, i.e., substantially limited in the

major life activity of seeing, there is *no need to* determine whether the individual is also substantially limited in the major life activity of working." *Id.* (emphasis added). This explanation better captures the obvious point that the EEOC apparently found it necessary to emphasize, that it may be simpler and entirely sufficient for a court to find an individual significantly limited in some other major life activity and not address working. We doubt that the EEOC intended to deter lower courts from making the practical determination they routinely make when faced with alternative arguments: whether to address only the issue or issues necessary to support a judgment, or to address a wider range of issues in the interests of judicial efficiency, taking into account the vulnerability of the various rulings to reversal on appeal. In any event, it is entirely inappropriate to place any weight on some perceived "reluctance" on the part of the EEOC to define "working" as a major life activity when it did so expressly in its regulations and then spent considerable effort to clarify the matter in its regulations and Interpretative Guidance.

For all of these reasons, reference to some perceived "circularity" in the concept of "working" as a major life activity, unnecessarily and confusingly complicates the analysis of lower courts presented with a claim that an individual is substantially limited in the major life activity of "working."

B. There is also a danger that identifying an alleged "circularity" will encourage lower courts to doubt whether "working" is a "major life activity" at all. The *amicus* brief for the Equal Employment Advisory Council ("EEAC") and the National Association of Manufacturers ("NAM") makes this argument expressly (at 13–20), relying in part on the quotation from *Sutton*. See also, *e.g.*, *Duncan* v. *Wash. Metro. Area Transit Auth.*, 240 F.3d 1110, 1117 (D.C. Cir. 2001) (en banc) (Randolph, Williams, Sentelle, JJ., concurring), *petition for cert. filed*, 69 U.S.L.W. 3763 (U.S. May 25, 2001) (No. 00-1776). Petitioner, however, has made no argument that

"working" is not a "major life activity," so the issue is not properly before the Court. In any event, the notion that "working" is not a "major life activity" makes no sense in the context of the ADA, the purposes that underlie it, and the compromises that produced it.

As an initial matter, the ADA itself directs that, except as otherwise provided in the Act,

> "nothing in this Act shall be construed to apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973 (29 U.S.C. 790 et seq.) or *the regulations issued by Federal agencies pursuant to such title*." 42 U.S.C. § 12201(a) (emphasis added.)

See *Bragdon* v. *Abbott*, 524 U.S. 624, 632 (1998) (Section 12201(a) "requires us to construe the ADA to grant at least as much protection as provided by the regulations implementing the Rehabilitation Act"). Both the original § 504 regulations issued by HEW in 1977 and the coordination regulations issued by HEW in 1978 and DOJ in 1981 included "working" in the definition of "major life activities" and continue to do so.[12]

The principal argument in support of the notion that working is not a major life activity, apart from the "circularity" and "last resort" arguments discussed above, is that "[m]any individuals do not work—or do not work full time—and for a variety of reasons." Brief *Amici Curiae* of the EEAC and NAM at 20. As examples, the brief says:

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[12] 42 Fed. Reg. 22,676, 22,678 (May 4, 1977) (HEW), promulgating 45 C.F.R. § 84.3(j)(2)(ii); 43 Fed. Reg. 2132, 2137 (Jan. 13, 1978) (HEW), promulgating 45 C.F.R. § 85.31(b)(2); 46 Fed. Reg. 40,686 (Aug. 11, 1981) (DOJ), transferring and redesignating 45 C.F.R. part 85 as 28 C.F.R. part 41; see 28 C.F.R. § 41.31(b)(2). The reports on the bills that became the ADA echoed these regulations. S. Rep. No. 101-116, at 22 (1989) ("A 'major life activity' means functions such as * * * working."); H.R. Rep. No. 101-485, pt. 2, at 52 (1990) (same); *id.*, pt. 3, at 28 (1990) (same).

> "Some adults choose not to work, because they have other priorities such as caring for children, or because they are financially independent, or because they are simply not interested. Some people do not work because they are children, or because they have chosen to retire. Other individuals are unemployed involuntarily; they may want to work, but cannot find a job." *Id.*

In the first place, those who choose not to work will never be plaintiffs in ADA Title I cases, because those people will not be seeking employment or protesting a termination that they choose to accept. In any event, not much analysis is required to appreciate that for the bulk of the adult population in the country short of retirement age, working is not just a "major" life activity but the principal "life activity," when one considers the number of waking hours per week that the average American spends at work and the importance that most Americans attach to their jobs. Not only do these Americans generally have to work to support themselves and their families, but many of them want to perform productive work to contribute to the general well-being of society. Indeed, even "financially independent" people often conclude that they will not be taken seriously by those they want to influence unless they have a "real job" or that the best way to make the contributions they want to make is through formal employment.

The concurrence in *Duncan* v. *Washington Metropolitan Area Transit Authority*, *supra*, suggests a similarly artificial difficulty:

> "[S]uppose there is an economic downturn and unemployment is high. Then more people will be found to be disabled as compared with a period when the gross domestic product is growing and unemployment is low. Why? Because the less likely it is that a person can find work the more likely that he is substantially limited in the major life activity of working—that in other words he

suffers from a disability." 240 F.2d at 1118 (Randolph, Williams, Sentelle, JJ., concurring).

This passage reflects a misconception about the ADA. While individuals with disabilities, along with individuals without disabilities, may find it more difficult to find employment during an economic downturn, the EEOC regulations (and common sense) make clear that the definition of "disability" turns on "the ability to perform" a class of jobs or a broad range of jobs in various classes, not simply on the failure to obtain employment, regardless of ability. 29 C.F.R. § 1630.2(j)(3)(i), Pet. Br. 19a. Those regulations also direct a comparison "to the average person having comparable training, skills and abilities," *id.*, and an economic downturn would affect both people with disabilities and those without. Finally, other developments, both economic and technological, affect whether one's impairment substantially limits a major life activity. As better hearing aids are developed, many hard-of-hearing individuals will be less limited in hearing in general and less limited in their ability to perform jobs that require hearing. Under *Sutton*, those developments will change the number of individuals who are disabled with respect to many major life activities recognized under the ADA. There is no reason to rule out "working" as a major life activity just because its application may also be affected by such developments.

All in all, it is a serious matter in this society to have a physical or mental impairment that substantially limits one's ability to work. Title I of the ADA is intended to ensure that such a person is not discriminated against in employment when, in spite of a serious impairment, he or she can nevertheless productively join the workforce, with or without reasonable accommodation. Those protections give some assurance that such individuals will have "equality of opportunity," "full participation" in society, the ability to live independently, and a fair opportunity for "self-sufficiency." See § 12101(a)(8). Ruling or suggesting that "working" is not a "major life activity" disserves these goals and does so for no good reason.

IV. Fear That Courts or Juries May Misapply the Standards for a "Qualified Individual with a Disability" or "Reasonable Accommodation" Is No Reason To Limit the Definition of "Disability."

Because Petitioner reads the court of appeals decision as substantially broadening the category of persons who may be entitled to the protections of Title I of the ADA, it warns against the immense economic consequences of such a ruling and cautions that "truly disabled people will suffer the consequences." Pet. Br. 30. In somewhat the same vein, the Brief of the American Trucking Associations, Inc., *et al.* as *Amici Curiae* argues (at 10) that defining "disability" properly "is critically important in keeping the lid on ADA litigation," because of the "'substantial cost'" in litigating "'the issues of reasonable accommodation, business necessity, and qualification standards.'" *Id.* at 11, quoting Samuel Issacharoff & Justin Nelson, *Discrimination with a Difference: Can Employment Discrimination Law Accommodate the Americans with Disabilities Act?*, 79 N.C. L. Rev. 307, 318 (2001). That brief also argues that "'allowing cases to proceed to the reasonable accommodation inquiry pushes inexorably toward the fact-intensive case-by-case analysis' * * * that cannot easily be resolved on motion for summary judgment," and that, for these reasons, "'[t]he definition of disability is the ballgame.'" *Id.* at 10-11, quoting Issacharoff & Nelson, *supra*, at 332, 337.

These concerns are overstated. Nothing about a "fact-intensive" claim renders it inherently unsuitable for summary judgment. If the underlying facts are undisputed, or if plaintiffs' version of the facts are taken as true for the purposes of a motion for summary judgment, then summary judgment may be appropriate. In any event, there is no reason to think that determinations of "disability" are any less fact-intensive than those of "reasonable accommodation" or whether one is qualified to perform the "essential functions of the employment position" within the meaning of § 12111(8).

Furthermore, there is something illogical about using the alleged breadth and burden of certain provisions of a statute to justify a narrow reading of an earlier provision. In our view, and in the view of the EEOC, Congress intended and enacted a definition of "disability" considerably broader than the one urged by Petitioner. If, as Petitioner and its *amici* claim, the resulting burdens under Title I are inappropriately onerous—a charge *amici* dispute—that concern should be addressed to Congress, not to this Court.

CONCLUSION

For the foregoing reasons, this Court should (1) correct the error of the court of appeals in limiting the major life activity of performing manual tasks to manual tasks at work, (2) clarify the application of the major life activity of performing manual tasks as explained above, (3) clarify the passage in *Sutton* that discourages lower courts from addressing limitations on the major life activity of working, (4) reject the invitation to limit the meaning of "disability" because of the alleged burdens of addressing "reasonable accommodation" and other issues that follow a determination of "disability," and (5) affirm the judgment of the court of appeals.

Respectfully submitted,

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APPENDIX

The *Amici* Organizations

AARP is a nonprofit membership organization serving more than thirty-four million persons age 50 and older that is dedicated to addressing the needs and interests of older Americans. One of AARP's primary objectives is to strive to achieve dignity and equality in the workplace through positive attitudes, practices, and policies towards work and retirement. In pursuit of this objective, AARP has since 1985 filed more than 200 *amicus* briefs before this Court and the federal appellate and district courts. More than forty percent of AARP's members are employed, and many of those with disabilities rely on the American's with Disabilities Act to create a work place free from discrimination. The protections of the Americans with Disabilities Act are especially important to AARP members because older persons have a higher incidence of disabilities than other populations.

The American Diabetes Association ("ADA") is the nation's leading nonprofit health organization providing diabetes research, information, and advocacy. The mission of the organization is to prevent and cure diabetes, and to improve the lives of all people affected by diabetes. As part of its mission, the ADA advocates for the rights of people with diabetes and supports strong public policies and laws to protect persons with diabetes against discrimination. The ADA has over 400,000 general members and over 17,000 professional members.

The American Occupational Therapy Association ("AOTA") is the national professional association of over 40,000 occupational therapists and occupational therapy assistants as well as students of the profession. The mission is to support the contributions of occupational therapy to health, wellbeing, productivity and quality of life. Occupational therapists provide treatment and intervention for people with physical and mental disabilities to promote full participation in society and maximum

achievement of human potential. AOTA advocates on behalf of the profession and the public through support of positive public policy such as that contained in the Americans with Disabilities Act.

The Arc of the United States ("The Arc"), through its nearly 1,000 state and local chapters, is the largest national voluntary organization in the United States devoted solely to the welfare of the more than seven million children and adults with mental retardation and their families. Since its inception, The Arc has vigorously challenged attitudes and public policy, based on false stereotypes, that have authorized or encouraged segregation of people with mental retardation in virtually all areas of life. The Arc was one of the leaders in framing and supporting passage of the Americans with Disabilities Act.

The Association on Higher Education And Disability ("AHEAD") is a non-profit organization committed to full participation in higher education and equal access to all opportunities for persons with disabilities. Its membership includes approximately 2,000 institutions (including colleges, universities, not-for-profit service providers, and standardized testing organizations), professionals, and college and graduate students planning to enter the field of disability practice. Many of its members are actively engaged in assuring compliance with the Americans with Disabilities Act and in providing reasonable accommodations to both students and employees at institutions of higher education. In addition, AHEAD members actively work with students in establishing vocational plans and job readiness. AHEAD publishes numerous resources on the implementation of the Americans with Disabilities Act by postsecondary educational institutions.

The Epilepsy Foundation® is the sole national, charitable voluntary health organization dedicated to advancing the interests of the more than two million people with epilepsy and seizure disorders. The term "epilepsy" evokes stereotyped

images and fears in others that affect people with this medical condition in all aspects of life, especially employment. Since its inception, the Foundation has worked to dispel the stigma associated with seizures and has supported the development of laws, such as the Americans with Disabilities Act, that protect individuals from discrimination based on these stereotypes and fears.

HalfthePlanet Foundation is a non-profit organization that offers comprehensive, reliable information, products, and services to people with disabilities, their families and friends. The Foundation administers a well-known website—halftheplanet.com—the most comprehensive disability resource on the Web, created by people with disabilities for people whose lives are touched by disability. HalfthePlanet Foundation supports the application of technology to promote the values of the Americans with Disabilities Act—independent living, social inclusion, equality of opportunity, economic self-sufficiency, and empowerment.

The Judge David L. Bazelon Center for Mental Health Law is a national legal advocacy organization dedicated to advancing the rights and dignity of individuals with mental disabilities. The Center has litigated several cases involving employment of individuals with mental disabilities under the Americans with Disabilities Act and has an interest in ensuring that people with mental disabilities are able to continue to contribute to society and to maintain employment through changes in the work environment that allow them to successfully do their jobs.

Lambda Legal Defense and Education Fund, Inc. ("Lambda") is a national public interest legal organization dedicated to the civil rights of lesbians, gay men and people with HIV/AIDS through impact litigation, education and public policy work. Founded in 1973, Lambda is the oldest and largest legal organization addressing these concerns. Lambda has appeared as counsel or *amicus curiae* in scores of cases in state and

federal courts on behalf of people living with HIV or other disabilities, including, in part, *Albertson's, Inc.* v. *Kirkingburg*, 527 U.S. 555 (1999); *Cleveland* v. *Policy Mgmt. Sys. Corp.*, 526 U.S. 795 (1999); *Bragdon* v. *Abbott*, 524 U.S. 624 (1998); *Doe* v. *Mut. of Omaha Ins. Co.*, 179 F.3d 557 (7th Cir. 1999), *cert. denied*, 528 U.S. 1106 (2000); *School Bd. of Nassau County* v. *Arline*, 480 U.S. 273 (1987); *Chalk* v. *U.S. Dist. Ct. Cent. Dist. of Cal.*, 840 F.2d 701 (9th Cir. 1988); *Raytheon Co.* v. *Cal. Fair Emp. & Hous. Comm'n*, 212 Cal. App. 3d 1242 (1989); *McGann* v. *H&H Music Co.*, 946 F.2d 401 (5th Cir. 1991), *cert. denied*, 506 U.S. 981 (1992); *Gonzales* v. *Garner Food Services, Inc.*, 89 F.3d 1523 (11th Cir. 1996), *cert. denied*, 520 U.S. 1229 (1997); and *Mason Tenders Dist. Council Welfare Fund* v. *Donaghey*, No. 93 Civ. 1154 (JES), 1993 WL 596313 (S.D.N.Y. Nov. 19, 1993). Lambda is particularly concerned with the unique barriers confronting persons with HIV and other stigmatized disabilities whose hopes for equal opportunity in the workplace hinge on the removal of needless barriers to their abilities to work.

The National Association of Protection and Advocacy Systems ("NAPAS") is the membership organization for the nationwide system of protection and advocacy (P&A) agencies. Located in all 50 states, the District of Columbia, Puerto Rico, and the federal territories, P&As are mandated under various federal statutes to provide legal representation and related advocacy services on behalf of all persons with disabilities in a variety of settings. The P&A system comprises the nation's largest provider of legally based advocacy services for persons with disabilities. NAPAS facilitates coordination of P&A activities and provides training and technical assistance to the P&A network.

The National Association of Rights Protection and Advocacy ("NARPA") was formed in 1981 to provide support and education for advocates working in the mental health arena. It monitors developing trends in mental health law and identifies

systemic issues and alternative strategies in mental health service delivery on a national scale. Members are attorneys, people with psychiatric histories, mental health professionals and administrators, academics, and non-legal advocates—with many people in roles that overlap. Central to NARPA's mission is the promotion of those policies and strategies that represent the preferred options of people who have been diagnosed with mental disabilities. Approximately 40 percent of NARPA's members are current or former patients of the mental health system. NARPA has submitted *amicus* briefs in many cases in federal and state courts in cases affecting the lives of persons with psychiatric disabilities, including *Olmstead* v. *L. C.*, 527 U.S. 581 (1999); *University of Alabama* v. *Garrett*, 531 U.S. 356 (2001); *Godinez* v. *Moran*, 509 U.S. 389 (1993); *Washington* v. *Harper*, 494 U.S. 210 (1990); *T.D.* v. *New York State Office of Mental Health*, 91 N.Y.2d 860, 668 N.Y.S.2d 153, 690 N.E.2d 1259 (1997); *Phoebe G.* v. *Solnit*, 252 Conn. 68, 743 A.2d 606 (1999). NARPA members were key advocates for the passage of Federal legislation such as the Americans with Disabilities Act and the Protection and Advocacy for Individuals with Mental Illness Act of 1986, 42 U.S.C. §§ 10801–51.

The National Health Law Program ("NHeLP") is a public interest law firm that engages in legal and policy advocacy on behalf of low income and working poor people, people with disabilities, people of color, and children. In its work, NHeLP represents individuals who are experiencing disabling conditions affecting work and the receipt of health insurance benefits. The Program also sponsors research and writing on laws which have been enacted to benefit our client groups. As such, NHeLP has considerable interest in the outcome of this case.

Established in 1909, the National Mental Health Association, with its more than 340 affiliates, is dedicated to promoting mental health, preventing mental disorders, and achieving victory over mental illness through advocacy, education,

research and services. NMHA envisions a just, humane and healthy society in which all people are accorded respect, dignity and the opportunity to achieve their full potential free from stigma and prejudice.

The National Mental Health Consumers' Self-Help Clearinghouse is a national technical assistance center established in 1986. It is run by and for people who are consumers of mental health services and survivors of psychiatric illness (known as consumers/survivors). Its mission is to promote consumer/survivor participation in planning, providing and evaluating mental health and community support services, to provide technical assistance and information to consumers/survivors interested in developing self-help services, and advocating to make traditional services more consumer/survivor-oriented. The Clearinghouse has an interest in helping people with mental illness live to their full potential as active members of the community.

The Polio Society serves its nationwide membership with information and referral services, training in self-advocacy to enforce the civil rights of persons with disabilities, and support for legislation of benefit to polio survivors and the disability community at large. The Americans with Disabilities Act is a key element of the Polio Society's advocacy. The members are persons with disabilities as a result of polio and post-polio syndrome ("P.P.S.").

Self Help for Hard of Hearing People ("SHHH") is a nonprofit, consumer, educational organization, founded in 1979 and devoted to the welfare and interests of those who cannot hear well, their relatives and friends. SHHH has 17,000 members and 250 chapters in 50 states. It is the largest consumer organization in the United States representing people with hearing loss. As the voice for hard of hearing people, SHHH strives to improve the quality of life for hard of hearing people through education, advocacy, and self help. SHHH

influences national policy to improve the rights, services, research and public awareness of the rights and needs of people with hearing loss.

AUG 31 2001

No. 00-1089

AUG 31 2001

IN THE

Supreme Court of the United States

TOYOTA MOTOR MANUFACTURING, KENTUCKY, INC.,

Petitioner,

v.

ELLA WILLIAMS,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF THE NATIONAL COUNCIL ON DISABILITY AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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29 C.F.R. § 1630.2(j)(1)(ii).....4, 8, 10

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29 C.F.R. § 1630.2(j)(3)(ii).....29

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135 Cong. Rec. S10790 (daily ed. Sept. 7, 1989)..... 1

135 Cong. Rec. S10791 (daily ed. Sept. 7, 1989).....6

136 Cong. Rec. E1774 19

136 Cong. Rec. E1914 20

136 Cong. Rec. H2315 (daily ed. May 15, 1990).....19

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136 Cong. Rec. H4613 (daily ed. July 12, 1990).....19

136 Cong. Rec. S9695 (daily ed. July 13, 1990).....16

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H.R. Rep. No. 101-485 (1990).....*passim*

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S. Rep. No. 101-116 (1989).....*passim*

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42 Fed. Reg. 22,676, 22,685 (1977).....13

56 Fed. Reg. 35,726, 35,728 (1991).....29

Robert L. Burgdorf, Jr., *"Substantially Limited" Protection from Disability Discrimination: The Special Treatment Model and Misconstructions of the Definition of Disability*, 42 Vill. L. Rev. 409 (1997).....21, 28

Robert L. Burgdorf, Jr., Disability Discrimination in Employment Law 137 (1995).....13

Matthew Diller, *Entitlement and Exclusion: The Role of Disability in the Social Welfare System*, 44 UCLA L. Rev. 361 (1996).....14

Louis Harris & Assocs., *The N.O.D./Harris Survey on Employment of People with Disabilities* 33 (1995).....18

Arlene B. Mayerson, *Restoring Regard for the "Regarded as" Prong: Giving Effect to Congressional Intent*, 42 Vill. L. Rev. 587 (1997).....21

National Council on the Handicapped, *On the Threshold of Independence* 27 (1988).....1

National Council on the Handicapped, *Toward Independence* 18 (1986).....1

Deborah Stone, *The Disabled State* (Philadelphia: Temple University Press, 1984) 14

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INTEREST OF *AMICUS CURIAE*

The National Council on Disability ("NCD") submits this brief *amicus curiae* based on its unique perspective on and experience with disability law and policy.[1] NCD (formerly the National Council on the Handicapped) is an independent federal agency composed of 15 members appointed by the President and confirmed by the Senate. Pursuant to its statutory mandate, NCD is charged with reviewing federal laws, regulations, programs, and policies affecting people with disabilities, and making recommendations to the President, the Congress, and other federal officials and entities regarding ways to promote equal opportunity, economic self-sufficiency, and inclusion and integration into all aspects of society for Americans with disabilities. 29 U.S.C. § 781.

As this Court has recognized, the statute at issue in this case, the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.* ("ADA"), originated from a proposal of NCD.[2] NCD first proposed the concept of the ADA in 1986. *See* National Council on the Handicapped, *Toward Independence* 18-21 (1986). In 1988, the NCD developed the original ADA bill that was introduced in the 100th Congress. *See* National Council on the Handicapped, *On the*

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[1] This brief was not authored, in whole or in part, by counsel for either party. No person or entity, other than the *amicus curiae*, its members and counsel, contributed monetarily to the preparation or submission of the brief. The parties consented to the filing of the brief and copies of their letters of consent have been lodged with the Clerk of the Court.

[2] *See Sutton* v. *United Airlines*, 527 U.S. 471, 484-85 (1999). *See also* 135 Cong. Rec. S10790 (daily ed. Sept. 7, 1989) ("The bill originated with an initiative of the National Council on Disability") (statement of Sen. Dole).

Threshold of Independence 27-39 (1988); S. 2345, 100th Cong., 134 Cong. Rec. 9379-82 (1988); H.R. 4498, 100th Cong., 134 Cong. Rec. 9599-9600 (statement of Rep. Coelho). Congress relied on and acknowledged the influence of NCD and its reports during congressional consideration and passage of the ADA.

Under its current statutory mandate, NCD is responsible for gathering information about the implementation, effectiveness, and impact of the ADA. NCD is thus intensely interested in ensuring that the ADA is interpreted and implemented in a manner consistent with the purposes for which it was proposed. NCD is also uniquely qualified to provide the Court with information about the background and framing of the ADA, implementation of the statute, and other information concerning issues affecting persons with disabilities. NCD is particularly concerned with and informed about the issue before the Court in this case, which is a threshold issue in all ADA cases: who is "disabled" and therefore protected by the ADA.

SUMMARY OF ARGUMENT

This case involves the proper interpretation of the definition of "disability" in the ADA, a threshold determinant of who will receive the protections the ADA provides. The specific question presented, whether "an impairment precluding an individual from performing only a limited number of tasks associated with a specific job qualifies as a disability," Petitioner's Brief ("Pet. Br.") at (i), may appear relatively narrow. As argued by Petitioner, however, the issue is in fact much broader: Petitioner is actually urging a radical rewriting of the test for identifying a "substantial limitation" – and thereby a "disability" – under the ADA. Petitioner's proposed test, if adopted by the courts, would prevent many individuals whom Congress intended the ADA to cover from receiving its protection,

including the provision of reasonable accommodations that they may need to secure and/or maintain employment.

In enacting the ADA, Congress recognized that individuals with a variety of disabilities were outside the economic and social mainstream of our society because of antiquated attitudes and the failure of employers and others to make modifications and accommodations to permit participation. Congress was particularly concerned about the extreme levels of unemployment faced by people with disabilities and adopted Title I of the ADA as a tool to encourage workplace participation. As part of the general ban on discriminatory policies and practices, Congress included in the ADA specific provisions requiring reasonable accommodation, which Congress found were "essential to accomplishing the critical goals of this legislation to allow individuals with disabilities to be part of the economic mainstream of our society." S. Rep. No. 101-116, at 10 (1989) [hereinafter "Senate Rep."]; H.R. Rep. No. 101-485, pt. 2, at 34 (1990) [hereinafter "House Rep."].

Congress recognized that exclusion takes place in a variety of ways to people with various types of disabilities. To address this problem broadly, Congress adopted an inclusive, three-prong definition of "disability," tracking the definition of "handicap" in Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 ("Section 504"). Under this definition, an individual is deemed disabled either if he or she has an impairment that "substantially limits" one or more major life activities, or if she or he has either a record of such an impairment or is regarded as having such an impairment. 42 U.S.C. § 12102(2)(A), (B) & (C). Under the Equal Employment Opportunity Commission ("EEOC") regulations implementing the ADA, being "substantially limited" in a major life activity means being either "unable to perform a major life activity . . . *or significantly restricted* as to the condition, manner or duration under which [the]

individual can perform a particular major life activity as compared to the condition, manner or duration under which the average person in the general population can perform that same major life activity." 29 C.F.R. § 1630.2(j)(1)(i), (ii) (emphasis added).

In this case, Petitioner attempts to erect a "rigorous threshold" for ADA coverage, Pet. Br. at 10, by devising its own test, without statutory or other foundation. According to Petitioner, "individuals claiming coverage under the ADA must demonstrate that they are *severely restricted* from using their hands to perform a *broad range of basic functions* needed to meet the *essential demands of everyday life*." Pet. Br. at 12-13 (emphasis added). This test is at odds with the statute, its legislative history, and the implementing regulations. The crux of Petitioner's argument reveals the extreme consequences of its position. Petitioner relies on the reasoning of the district court, which found Respondent's claim that she was substantially limited in manual tasks to be "irretrievably contradicted by her continual insistence that she could perform the tasks in assembly and paint inspection without difficulty; positions requiring manual tasks." Pet. Br. at 7, 9. Since Petitioner itself characterizes the jobs that Ms. Williams was performing as being "modified duty," and the "easiest jobs" in the plant, Pet. Br. at 5, Petitioner is in essence arguing that a plaintiff must be totally unable to do even modified tasks in order to be "substantially limited" in manual tasks and/or working.

Petitioner's Draconian position exemplifies its erroneous view that Congress intended to extend ADA protection only to the "truly disabled" – persons who, according to Petitioner, are so severely restricted that they are unable to meet the essential demands of daily life. Pet. Br. at 12-13. Petitioner's concept of the "truly disabled" reinforces the stereotypical view of disability that Congress sought to reverse in overwhelmingly passing the ADA. The

notion of the "truly disabled" comes from the social welfare arena where the determination of "disability" is used to decide who should be excused from societal obligations, including work. The ADA embodies a very different notion of people with disabilities – individuals who have the talent, skills, abilities, and desire to participate actively in society but are precluded from doing so because of antiquated attitudes or the failure to provide reasonable accommodations. ADA plaintiffs are not asking to be excused from participation and receive monetary benefits. ADA plaintiffs, like Respondent herself, are those who would rather keep working than go on the welfare rolls.

Using the tests set forth in the ADA implementing regulations and this Court's decisions in *Sutton v. United Airlines, Inc.*, 527 U.S. 471 (1999), *Murphy v. UPS*, 527 U.S. 516 (1999), and *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555 (1999), instead of the harsh criteria concocted by Petitioner, a jury could properly find that Respondent is "disabled" within the meaning of the ADA because she is significantly restricted as to the condition, manner and duration of performing manual tasks as compared to the average person in the general population. Allowing her to proceed on her ADA claim simply permits her to have her day in court to determine whether she could have been reasonably accommodated in order to keep her job.

I. THE INTERPRETATION OF "SUBSTANTIAL LIMITATION" URGED BY TOYOTA RUNS COUNTER TO THE PURPOSES OF THE ADA.

This case involves an employee who has significant restrictions in manual activities – restrictions that, contrary to Petitioner's portrayal, limit her ability to perform manual tasks far beyond the "single," "particular" job to which Petitioner assigned her. This is an employee who was working and could have continued to do so had Petitioner

not reassigned her to a job that she could not perform. This is precisely the type of individual who Congress found would benefit from the employment provisions of the ADA.

As emphasized in the legislative history of the ADA, "[r]easonable accommodation is a key requirement of the Rehabilitation Act and of this Act." House Rep., pt. 2, at 33; Senate Rep. at 32. After reviewing governmental and private studies that revealed "staggering levels of unemployment" among people with disabilities,[3] Congress concluded that "the provision of all types of reasonable accommodations is essential to accomplishing the critical goal[s] of this legislation – to allow individuals with disabilities to be part of the economic mainstream of our society." Senate Rep. at 10; House Rep., pt. 2, at 34.[4] As demonstrated below, the miserly reading of "disability" suggested by Petitioner would prevent many individuals who Congress intended to be protected by the ADA from receiving the reasonable

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[3] Senate Rep. at 9; *see also* House Rep., pt. 2, at 32 (*citing* Louis Harris & Assocs., *The ICD Survey of Disabled Americans: Bringing the Disabled into the Mainstream* 50 (1986) (finding that two-thirds of working age disabled Americans were unemployed even though the majority (66%) of those individuals wanted to work) and U.S. Dept. of Commerce, Bureau of the Census, *Labor Force Status and Other Characteristics of Persons with Disabilities* 2 (1989) (finding that twice as many adults with disabilities had household incomes of $15,000 or less compared to adults without disabilities)).

[4] "[T]his bill will help our country use an immense amount of talent, intelligence, and other human resources which heretofore have been underestimated, underdeveloped, and underutilized." 136 Cong. Rec. H2433 (daily ed. May 17, 1990) (statement of Rep. Luken). "Our economy can no longer afford not to enlist the unique abilities and talents of people with disabilities." 135 Cong. Rec. S10791 (daily ed. Sept. 7, 1989) (statement of Sen. Riegle).

accommodation they need to secure and/or maintain employment.

A. Petitioner's "Rigorous Threshold" Test Is Without Statutory or Other Foundation.

The critical issue presented by this case, which affects each and every ADA case, is how properly to determine whether an individual is "substantially limited in a major life activity."[5] Petitioner proposes a test for the "substantially limited" determination that would preclude an affirmative finding for virtually any individual who is able to live an independent, productive life. But as the ADA's text, implementing regulations and legislative history reveal, such an individual is precisely who Congress intended the ADA to benefit.[6]

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[5] NCD does not endorse the Sixth Circuit's opinion to the extent it is read to limit the manual tasks inquiry to a focus on "job-related" tasks. The proper approach is to consider *all* restrictions, including those both at home and at work, in determining whether an individual is substantially limited in manual tasks. This is especially true in a case like this, where Respondent's activities in one sphere affect her activities in others.

[6] Petitioner's arguments based on the congressional finding of 43,000,000 people with disabilities are misplaced. As the Court noted in *Sutton*, the ADA finding referring to this number originated in a corresponding finding in a report by the NCD. *Sutton*, 527 U.S. at 484-85. Neither NCD nor Congress intended that such a figure represent the number of persons to be protected by the ADA; rather, the figure was presented as a rough estimate of the persons *then* having *actual* disabilities. The ADA's three-prong definition of "disability," in contrast, covers not only those with actual disabilities but also those who have a "record of" or are "regarded as having" a substantial impairment. 42 U.S.C. § 12102(2)(B)-(C)). The number of persons protected under the

(footnote continued on next page)

The EEOC regulations implementing Title I of the ADA define a "substantial limitation" as a significant restriction in the "condition, manner or duration under which the average person ... can perform that same major life activity." 29 C.F.R. § 1630.2(j)(1)(ii). Manual tasks are explicitly recognized as a major life activity.[7] *Id.* Petitioner, while professing loyalty to the EEOC regulations and accompanying guidance, in fact makes up its own test for determining a substantial limitation in manual tasks: "individuals claiming coverage under the ADA must demonstrate that they are *severely restricted* from using their hands to perform a *broad range of basic functions* needed to meet the *essential demands of everyday life*." Pet. Br. at 12-33 (emphasis added).

Petitioner's proposed heightened requirements are built on a faulty premise. First, the EEOC regulations define a person as "substantially limited" if he or she is

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three-prong definition is necessarily indeterminant: it includes all those who are subjected to discrimination because they are perceived or treated as having a disability, whether or not they actually do.

In any event, in discussing the 43,000,000 figure, this Court in *Sutton* concluded that Congress favored a functional approach to determining who is disabled. *See Sutton*, 527 U.S. at 485-86. Such a functional approach is fully consistent with the analysis presented by NCD here.

[7] The inclusion of manual tasks as a major life activity is codified at 42 U.S.C. § 12201(a), which incorporates by reference the standards applied under the various federal agencies' regulations implementing Section 504, which uniformly list "manual tasks" as a major life activity. *See, e.g.*, 7 C.F.R. § 15b.3(k) (Dep't of Agric.); 32 C.F.R. § 56.3(c)(2) (Dep't of Defense); 28 C.F.R. § 42.540(k)(2)(ii) (Dep't of Justice).

"significantly restricted" – not, as Petitioner would have it, only if he or she is "*severely* restricted." Second, Petitioner refers to "basic functions," a term it uses interchangeably with "basic activities" and "basic tasks," apparently in reliance on a portion of the EEOC guidance explaining that the "major life activities" listed in the guidance are not exhaustive, and that other "basic activities" may also constitute major life activities.[8] In this case, however, there is no need to decide if the life activity at issue is "basic," because "manual tasks" is a specifically listed "major life activity." Once a major life activity is identified, the inquiry turns to restrictions in the manner, condition and duration under which the activity is performed in comparison to the average person. No further consideration of whether the relevant activity is "basic" is appropriate.

Petitioner bases the crux of its argument on the fact that Respondent is able to perform *some* manual activity. Petitioner adopts the reasoning of the district court that Ms. William's claim (that she was substantially limited in manual tasks) was " 'irretrievably contradicted by her continual insistence that she could perform the tasks in assembly and paint inspection without difficulty; positions requiring manual tasks.' " Pet. Br. at 7 (quoting Pet. App. 36a). Since Petitioner itself characterizes the jobs that Ms. Williams was performing as being "modified duty," and the "easiest jobs" in the plant, Pet. Br. at 5 (citing Pet. App. 25a), Petitioner is in essence arguing that a plaintiff must be totally unable to do even modified tasks in order to be "significantly restricted" in manual tasks and/or working.

With respect to Ms. William's particular impairment, Petitioner asserts that a person with CTS could be

[8] *See* Pet. Br. at 3 (citing 29 C.F.R. § 1630.2(i), (j)(1)(ii) & Appendix).

substantially limited in manual tasks only if the CTS were "so severe that it *precludes* an individual from performing a *broad range* of *basic* manual functions that the average person typically performs without difficulty." Pet. Br. at 18, n.6 (emphasis added). While this test reflects one way that a plaintiff may show a substantial limitation, *see* 29 C.F.R. § 1630.2(j)(1)(i) (unable to perform), it totally ignores the alternative basis for making such a showing that is relevant here – that the plaintiff, while not precluded, is significantly *restricted* from performing manual tasks. *See id.* § 1630.2(j)(1)(ii) (significantly restricted).

Such restriction is plainly present in this case. The evidence in the record demonstrates substantial restrictions in the condition (pain),[9] manner (numerous restrictions on activities),[10] and duration (time restrictions)[11] under which Ms. Williams can perform manual tasks as compared to the

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[9] Ms. Williams' conditions are inherently painful. As noted in the William J. Weikel, Ph.D., Vocational Report, her conditions include, among others: bilateral tenderness, peritendinitis inflammation, myofascial pain, and rotator cuff tendinitis. (J.A. 37.)

Ms. Williams experiences pain and discomfort daily. *See* J.A. 35.

[10] Since 1992, Ms. Williams' manual activity involving repetitive activity, lifting, and overhead work has been permanently restricted. J.A. 43. Toyota's doctors added to these permanent restrictions the additional restrictions: "no above chest level, extended reach, or repetitive rotary or lateral movements of head/neck." J.A. 43-44.

[11] *See, e.g.*, J.A. 35 ("Sitting for a long period of time and not moving and stirring, it hurts"); J.A. 36 (After driving approximately 60-80 miles, "I'm feeling the nerves tingling in my shoulder, and my neck tightens up, and I get into quite a bit of pain.").

condition, manner and duration under which the average person in the general population can perform such tasks.[12]

Petitioner correctly points out that Congress did not intend to cover "[a] person with a minor trivial impairment." Pet. Br. at 25. What Petitioner fails to acknowledge is the type of impairment Congress considered to constitute a "trivial impairment": for example, "a simple infected finger." Senate Rep. at 23; House Rep., pt. 2, at 52. In fact, Congress used this example to demonstrate that substantial meant nontrivial. It is callous at best to compare Respondent's significant medical conditions and functional restrictions to the condition of someone suffering from a simple infected finger. It is also plainly misguided to compare Ms. Williams to someone who cannot walk 11 miles without pain, as Petitioner does with reference to an example in the EEOC guidance. *See* Pet. Br. at 26 (citing House Rep., pt. 2, at 52; Senate Rep. at 23). The point of the EEOC example is to demonstrate that, since most people would experience similar pain at the eleventh mile, the walker is no different that any member of the general public. There is no plausible basis for Petitioner's suggestion that a person with numerous physical impairments, and numerous physical restrictions, is the same as any other member of the general public.

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[12] Respondent's manual tasks claim is not limited to working, but rather is based on evidence in the record that establishes her substantial restrictions at home and work. As the Sixth Circuit explicitly recognized: "Here, the impairments of limbs are sufficiently severe to be like deformed limbs and such activities affect manual tasks associated with working, as well as manual tasks associated with recreation, household chores and living generally." Pet. App. 6a.

B. Limiting Coverage to the Group That Petitioner Characterizes as the "Truly Disabled" Would Defeat the Core Goals of the ADA.

Petitioner attempts to justify its contention that, in order to be deemed "disabled" under the ADA, a person must be *severely* restricted in performing the *essential* demands of daily life, Pet. Br. at 12, 13, by invoking a misguided notion that the ADA was meant to "extend only to those who are truly disabled." Pet. Br. at 10, 11, 18, 29-33.[13] According to Petitioner, Respondent is not disabled because she can "brush her teeth, she can do the laundry, she can pick up items from the floor, . . . she can drive a car" and she was able to do her old job (which Petitioner admits was the easiest job in the plant). Pet. Br. at 18, 5. Petitioner asserts that this is "simply not the case for the person who has

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[13] The exact origin of the phrase "truly disabled" is unclear. However, it has been used in the Social Security income context to mean individuals who are unable to support themselves. In *Schweiker v. Chilicky*, 487 U.S. 412 (1988), Justice O'Conner's majority opinion cited portions of the Congressional Record in which Senator Moynihan referred to the way in which the Social Security Administration "has tried to reduce program cost by terminating the benefits of hundreds of thousands of truly disabled Americans," and Congressman Rostenkowski spoke of "massive numbers of beneficiaries who have lost their benefits over the last 3 years even though they are truly disabled and unable to work." *Id.* at 416 (citing Congressional Record). To this point, then, the United States Supreme Court has only recognized the phrase "truly disabled" in reference to traditional social welfare legislation in which the meaning of disability serves a pure gatekeeper function with regard to monetary benefits and other types of compensation. The phrase was used during the ADA legislative process only by members of Congress who opposed the current definition. *See infra* note 22.

missing or deformed limbs,"[14] an example of Petitioner's "truly disabled" and legitimate ADA plaintiff. Pet. Br. at 18.

Petitioner's notion of the "truly disabled" belies the ADA's text implementing regulations and legislative history. If Congress had been interested only in the mythic "truly disabled" person, it would not have adopted a definition of disability that had been given broad agency and court interpretations under Section 504. In 1977, the Department of Health, Education and Welfare ("HEW"), which had the responsibility to issue Section 504 regulations, explicitly rejected a plea to limit Section 504 coverage to "traditional" disabilities. HEW relied on the breadth of the statutory language and concluded that it could not be reconciled with an interpretation that would limit coverage to "persons who have those severe, permanent, or progressive conditions that are most commonly regarded as handicaps."[15] As this Court stated in *School Board of Nassau County v. Arline*, 480 U.S. 273, 280 n.5 (1987), the definition is broad but only those who are qualified are eligible for relief.

Petitioner's narrow concept of disability invokes an earlier era that Congress clearly meant to reverse in enacting

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[14] Pet. App. 4a (citing the Sixth Circuit's opinion below).

[15] 42 Fed. Reg. 22,676, 22,685 (1977). The agency did not limit definition to traditional disabilities because of the "difficulty of ensuring the comprehensiveness of any such list," particularly in light of the fact that new disorders may develop in the future. *School Board of Nassau County v. Arline*, 480 U.S. 273, 280 n.5 (1987) (*citing* 45 C.F.R. pt. 84, App. A, at 310 (1985)). *See also* Senate Rep. at 22 (same). Consistent with the HEW approach and *Arline*, the courts have recognized a wide variety of disabilities for purposes of Section 504 protection. *See* Robert L. Burgdorf, Jr., Disability Discrimination in Employment Law 137-40 (1995) (citing cases).

the ADA. Petitioner's notion of a "truly disabled" person comes from an era where the "disability" label excused people from societal obligations.[16] The ADA envisions a very different notion of persons with disabilities: people who have the talent, skills, abilities, and desire to participate, but are precluded from doing so because of antiquated attitudes or the failure to provide reasonable accommodations.[17] ADA plaintiffs are not asking to be excused from participation and receive monetary benefits. ADA plaintiffs are those who would rather keep working than go on the welfare rolls.[18] The phrase "truly disabled" harks back to an era when social welfare was the prominent response to disability. In enacting the ADA, Congress expressly recognized that this paternalistic, albeit well-intentioned, notion of disability caused isolation and

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[16] *See* Matthew Diller, *Entitlement and Exclusion: The Role of Disability in the Social Welfare System*, 44 UCLA L. Rev. 361 (1996). *See also* Deborah Stone, *The Disabled State* (Philadelphia: Temple University Press, 1984). Unlike the ADA definition, the disability definition under the Social Security statute requires an inability to work. *See* 42 U.S.C. § 1382c(a)(3)(A).

[17] As Congress recognized, among the major reasons that people with disabilities are discriminated against in the workplace are "standards and criteria that have the effect of denying opportunities; failure to provide or make available reasonable accommodations." Senate Rep. at 9 (1989).

[18] Congress was persuaded that the ADA employment provisions would result in "more persons with disabilities working, in increased earnings, in less dependence on the Social Security System for financial support, in increased spending on consumer goods, and increased tax revenues." Senate Rep. at 17 (quoting Att'y Gen. Thornburg). As Congress noted, a 1987 Harris poll had found that 82% of people with disabilities said they would give up benefits in favor of a full-time job. *See id.* at 9.

exclusion from the mainstream of society to an extent utterly incompatible with the equal opportunity guaranteed by our nation's civil rights laws. Congress sought through the ADA to reverse stereotypical views of people with disabilities as unable to function in and contribute to society.

In referring to a person with visibly "deformed" arms and hands as one who is "truly disabled," Pet. Br. at 18, Petitioner simply assumes that, unlike Ms. Williams, such a person could never drive a car, do the laundry or perform personal hygiene activities.[19] Yet such an individual can readily drive a modified vehicle, speak on a phone with a headset, and use various home appliances. The mere fact that such persons have invested in creating home environments that can accommodate their personal physical needs and enable them to perform "a broad range of basic functions" certainly does not mean that they will not encounter discrimination in the employment market, or that the ADA should not be applied to ensure that they can ask for reasonable accommodations such as modified keyboards or headphones in the workplace.

By raising the specter of the "truly disabled," Petitioner is attempting to resurrect society's stereotypes about disability, suggesting that disabled people must be visibly and functionally *un*able to perform in certain specific,

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[19] Petitioner's assumptions are based on the types of stereotypes the ADA is designed specifically to address. Without denying the difficulties that such persons encounter in a world that assumes their inabilities, many persons with "missing or deformed limbs" live highly functional and independent lives. For example, Stacey Conner, born without arms, "dresses herself every morning with the help of a suction cup and a stick" and "mostly does everything anybody else does in her own way." Jess Williams, *Don't Fix Me I'm Not Broken*, Stephenville Empire-Tribune, Jan. 1989.

socially expected ways before they are entitled to the protection of law. These are the very social stereotypes that subject persons with disabilities to discrimination in the first place. In opposition to this, the ADA and the EEOC regulations, consistent with Congress' intent, are designed to protect persons with disabilities who are able to do many things, ordinary and extraordinary.

Senator Dole, during the congressional debates on the ADA, expressed a vision of a future where people with disabilities would be able to fully participate in society: "Living independently and with dignity means opportunity to participate fully in every activity of daily life. . . . The ADA offers such opportunity to persons with disabilities." 136 Cong. Rec. S9695 (daily ed. July 13, 1990) (statement of Sen. Dole). It would be ironic indeed if this promise of the ADA were the death-knell to ADA coverage.

Senator Harkin, a primary author and sponsor of the ADA, referred to the wide range of people with disabilities to be covered by the Act, including "an elderly grandmother with arthritis, but determined to fend for herself and live her retirement years in dignity." 135 Cong. Rec. S10712 (daily ed. Sept. 7, 1989) (statement of Sen. Harkin). Would this individual be precluded from bringing an ADA claim if she still did some household chores and had a volunteer job at the library?

The fundamental goal of the ADA to integrate people with disabilities in all aspects of economic and social life would be undermined if participation itself was evidence of no substantial limitation and therefore no disability. The ability to do some jobs and some household chores cannot strip away protection against discrimination, including the provision of reasonable accommodation, if the ADA is to be

honored consistent with Congress' view of people with disabilities as able, talented and skilled.[20]

C. Congress Chose Not To Limit Coverage Under the ADA Based on Speculation About Costs.

Petitioner asserts that extending the protective reach of the ADA to persons with limiting impairments who are "otherwise capable" of functioning in basic activities "will inexorably siphon off the resources employers can devote to assisting truly disabled persons." Pet. Br. at 30. This purportedly altruistic suggestion not only is suspect as a matter of economics, but also ignores one of the fundamental decisions made by Congress in enacting the ADA. Defining "disability" narrowly in order to conserve resources to protect only the "truly disabled" was never advocated, and is not now endorsed, by NCD – the agency that originally proposed the ADA – or by any of the other disability rights organizations that urged the ADA's adoption or have joined as *amici* in this case. As intended by these organizations and Congress, the ADA addresses the problem of limited employer resources not through the definition of "disability," but rather by limiting the accommodations an employer must make for persons with disabilities to those that do not impose an "undue hardship" on the employer's business. 42 U.S.C. § 12112(b)(5)(A).

Throughout the legislative process, Congress heard cost-based objections to the proposed reach of the ADA,

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[20] *See, e.g.*, 135 Cong. Rec. S10793 (daily ed. Sept. 7, 1989) ("Too many people forget that the disabled have many abilities as well as disabilities.") (statement of Senator Biden).

specifically in the context of the definition of disability.[21] Remarkably, one opponent of the ADA phrased his objections in virtually identical terms as those used by Petitioner here. Representative Craig stated:

> One of my strongest objections to this bill is that it [. . . would] *siphon away* the benefits and protection that should be reserved for the *truly disabled*. I am speaking here about the definition of a disability in terms of coverage under this act.[22]

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[21] However, "[s]everal witnesses also explained that Title I of the ADA (employment discrimination) is modeled after regulations implementing the Rehabilitation Act of 1973 . . . and that compliance with these laws has been 'no big deal.' " Senate Rep. at 10. In fact, findings with respect to compliance with the ADA belie the cost objectives voiced during the legislative process. *See, e.g.,* Louis Harris & Assocs., *The N.O.D./Harris Survey on Employment of People with Disabilities* 33 (1995) ("During the debate about the ADA, much was made of the perception that the costs would be prohibitive. This is not the case for most employers.") The 1995 Harris survey reported that 79% of employers said the inclusion of more people with disabilities into the workforce was a "boost to the nation." *Id.* at 21.

[22] Representative Craig was particularly concerned about the ADA's inclusion of persons with HIV within the definition of disability, as well as others whom he did not consider to be "truly disabled." Representative Delay opposed the legislation on the ground that it "just about makes everyone disabled, whether you are truly disabled and show symptoms of disability." 136 Cong. Rec. H2315 (daily ed. May 15, 1990). Representative Dannemeyer suggested limiting the ADA's protection to "those who are disabled as a result of birth or accident. They are truly disabled people, and we should be passing Federal legislation to protect people in that unfortunate status." 136 Cong. Rec. H4613 (daily ed. July 12, 1990).

136 Cong. Rec. E1774 (emphasis added). Likewise, a witness for the National Federation of Independent Businesses urged that Congress provide an exclusive list of disabilities as a way of limiting the costs of accommodation.[23] This and other suggested means of limiting the definition of "disability" for cost reasons were specifically rejected by Congress. As Representative Hoyer explained:

> Throughout the process on the ADA, we were often asked to substitute for this definition a list of selected disabilities that would be the only disabilities covered under the act. *That approach was rejected by every committee*. Instead, the act retains the flexibility definition that was first adopted in Section 504 of the Rehabilitation Act of 1973, that has been in effect for over 15 years, and that was recently explicated clearly by the Supreme Court in *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987).

136 Cong. Rec. E1914 (emphasis added).

Ironically, following the suggestion of Petitioner to limit ADA coverage to those it characterizes as "truly

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[23] *Americans with Disabilities Act of 1989: Hearings on H.R. 2273 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 101st Cong. 89-90 (1989) (statement of John J. Motley III, National Federation of Independent Businesses). Certain members of Congress reiterated this proposal. *See* 136 Cong. Rec. H2621 (daily ed. May 22, 1990) (statement of Rep. McCollum); 135 Cong. Rec. S10772 (daily ed. Sept. 7, 1989) (statement of Sen. Armstrong).

disabled" would preclude accommodations for persons with disabilities that employers can provide at minimal or no cost. As specifically stated in the legislative history:

> The legislation also specifies, as examples of reasonable accommodation, job restructuring, part-time or modified work schedules and reassignment to a vacant position. . . . Part-time or modified work schedules can be a no-cost way of accommodation. . . .
>
> Reasonable accommodation may also include reassignment to a vacant position. If an employee, because of disability, can no longer perform the essential functions of the job that she or he has held, a transfer to another vacant job for which the person is qualified may prevent the employee from being out of work and the employer from losing a valuable worker.

Senate Rep. at 31-32.

Ms. Williams is a quintessential example of a disabled person who may be accommodated in the workplace at minimal or no cost. In light of the "undue hardship" provision in the ADA, properly understanding the statute's definition of "disability" to include impairments such as those of Ms. Williams plainly would not "siphon off" resources from those most deserving of ADA protection.

II. AN IMPROPER INTERPRETATION OF THE "SINGLE JOB" EXCEPTION EXCLUDES FROM ADA PROTECTION MANY WHOM CONGRESS INTENDED TO COVER.

This Court need not address the question whether Respondent is substantially limited in working in order to decide this case. However, in the event the Court does address the issue, Petitioner's misstatement of the proper test for resolving that question warrants response, particularly in light of the disturbing trend in the lower courts to overapply the "single job" exception to a finding of a substantial limitation in working.[24]

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[24] Many courts have misapplied the "single job exception" to find that plaintiffs are not substantially limited in the major life activity of working, despite the fact that the plaintiff's impairment would also impact the ability to perform jobs, in addition to the one at issue, requiring the same tasks. *See, e.g.,* Arlene B. Mayerson, *Restoring Regard for the "Regarded as" Prong: Giving Effect to Congressional Intent*, 42 Vill. L. Rev. 587, 598 n.47 (1997) (citing cases in which plaintiffs were found not to be disabled despite the fact that their impairments would limit the ability to perform many jobs); Robert L. Burgdorf, Jr., *"Substantially Limited" Protection from Disability Discrimination: The Special Treatment Model and Misconstructions of the Definition of Disability*, 42 Vill. L. Rev. 409, 540 (1997) ("The exclusion-from-one-job-is-not-enough formula has resulted in, or contributed to, the dismissal of ADA or section 504 of the Rehabilitation Act claims by plaintiffs with [various serious impairments]."). Not all courts have followed this trend. *See, e.g., Fitzpatrick v. City of Atlanta,* 2 F.3d 1112 (11th Cir. 1993); *Leslie v. St. Vincent New Hope, Inc.*, 916 F. Supp. 879 (S.D. Ind. 1996); *Scharff v. Frank*, 791 F. Supp. 182 (S.D. Ohio 1991).

Under the EEOC standard, an ADA plaintiff is "substantially limited" in working if she can establish that she is significantly restricted in the ability to perform either (1) a class of jobs or (2) a broad range of jobs in various classes, as compared to the average person with comparable training, skills and abilities. 29 C.F.R. § 1630.2(j)(3)(i). In what has come to be known as the "single job" exception, the EEOC standard provides that "[t]he inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working." *Id.*[25]

In this case, Respondent's restrictions substantially limit her ability to do assembly line work, the work she has done virtually all of her life. Contrary to Petitioner's

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[25] NCD has historically criticized the EEOC's "class of jobs" test and "single job" exception because of the possibility for their abuse. For example, courts have erroneously required plaintiffs to meet the criteria set forth in 29 C.F.R. § 1630.2(j)(3)(ii) in order to substantiate a claim under the third prong of the ADA's "disability" definition, *i.e.*, a claim based on being "regarded as" having a disability (as opposed to actually having a disability). As indicated by the ADA's legislative history and this Court's decision in *Arline*, 480 U.S. at 284, the proper focus with respect to a "regarded as" claim is on the allegedly discriminatory conduct of the employer, not any limitations of the plaintiff.

> [A] person who is rejected from *a* job because of the myths, fears, and stereotypes associated with disabilities would be covered under this third test, *whether or not the employer's perception was shared by others in the field* and whether or not the person's physical or mental condition would be considered a disability under the first or second part of the definition.

House Rep., pt. 3, at 30 (1990) (emphasis added). *See also* Senate Rep. at 24; House Rep., pt. 2, at 53.

suggestion, the fact that Ms. Williams could do the "easiest job" in the Toyota plant where she worked, Pet. Br. at 5 (citing Pet. App. 25a), cannot mean that Ms. Williams is not significantly restricted in a "class of jobs." Ms. Williams *is* significantly restricted from performing the broad range of other jobs that, within the wide class of jobs making up "assembly line work," involve the motions her impairment prevents her from performing. Petitioner relies on the district court's reasoning that the *ability* to do a single, particular job within a class of jobs means that someone is not substantially limited in working. As discussed below, that reasoning turns the EEOC regulation and this Court's decisions in *Sutton* and *Murphy*, in which the plaintiffs were able to do many other jobs within a class of jobs except one, on their heads.

Far from advising that the ability to perform a single, particular job precludes a finding that a person is significantly restricted in working, the EEOC regulations simply explicate the "class of jobs" test by explaining that the inability to perform a *single, particular* job would not be a "substantial limitation" in working.

The EEOC based the "single job" exception on express legislative history, which emphasizes the narrowness of the exception:

> A person who is limited in his or her ability to perform only a particular job, *because of circumstances unique to that job site or the materials used*, may not be substantially limited in the major life activity of working. For example, an applicant whose trade is painting would not be substantially limited in [the] major life activity of working if he has a mild allergy to a *specialized paint* used by one

> employer which is not generally used in the field in which the painter works.

House Rep., pt. 2, at 29 (emphasis added).

The EEOC also relied on cases decided under the Rehabilitation Act that illustrate that the distinction between a particular job and a class of jobs involves analyzing whether the tasks or circumstances of the job at issue are in some way unique. *See* 29 C.F.R. pt. 1630, App. (Section 1630.2(j)). The case that initially established what has become known as the "single job exception" was *E.E. Black, Ltd. v. Marshall*, 497 F. Supp. 1088 (D. Haw. 1980). The applicant in *E.E. Black* was disqualified from all of the employer's apprentice carpenter positions after a pre-employment medical exam revealed that he had a congenital back abnormality, which the employer perceived would prevent him from doing the heavy lifting required of its apprentice carpenters. The court rejected the notion that the inability to perform a specific job necessarily constituted a substantial limitation in working because the job might be so unique that it would not affect the employee's ability to work in his/her chosen field. The court gave the following examples, which emphasize the unique aspects of what might constitute a "single job":

> . . . An individual with acrophobia who was offered 10 deputy assistant accountant jobs with a particular company, but was disqualified from one job because it was on the 37th floor . . . . An individual with some type of hearing sensitivity who was denied employment at a location with very loud noise, but was offered positions at other locations . . . .

E.E. Black, 497 F. Supp. at 1099.

In contrast to the individuals in these examples, the court concluded, the plaintiff in *E.E. Black* in fact was substantially limited in working because the employer's criteria would preclude him from doing the jobs required to become a journeyman, his chosen field. *Id.* at 1102.

In *Jasany v. United States Postal Service*, 755 F.2d 1244 (6th Cir. 1985), a former U.S. postal employee with strabismus (crossed eyes) was terminated when he became unable to operate a sorting machine due to his condition. The Sixth Circuit held that Jasany was not a handicapped individual, as his condition did not affect his ability to carry out other activities required by his job, only his work on a particular sorting machine. Similarly, in *Forrisi v. Bowen*, 794 F.2d 931 (4th Cir. 1986), an employee with acrophobia (fear of heights) was deemed to not be substantially limited in working because he was able to work in his chosen field except when he was "unable [because of his acrophobia] to exercise his acknowledged abilities above certain altitudes." *Id.* at 935.

This Court's decisions in *Sutton* and *Murphy* involved individuals whose impairments did not "significantly restrict" their ability to pursue their chosen fields.[26] In *Sutton*, the Court held that exclusion from the

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[26] It is important to note that, in *Sutton* and *Murphy*, the Court confined the question of what other jobs the plaintiffs could perform to the class of jobs involved. This is consistent with the approach taken by the EEOC. *See* 29 C.F.R. pt. 1630, App. (Section 1630.2(j)). ("For example, an individual who has a back condition that prevents the individual from performing any heavy labor job would be substantially limited in the major life activity of working because the individual's impairment eliminates his or her ability to perform a class of jobs. *This would be so even if the individual were able to perform jobs in another class, e.g., the class of semi-skilled jobs.*") (emphasis added).

position of "global" airline pilot for one employer did not constitute a substantial limitation in working since "global" pilot jobs constituted a small subset of pilot jobs. *See Sutton*, 527 U.S. at 492-93 (citing 29 C.F.R. pt. 1630, App. (Section 1630.2(j)). In *Murphy*, the Court held that Mr. Murphy's ability to be a mechanic was not substantially limited if the only jobs unavailable to him were those requiring a DOT license, a small subset of the mechanic "class of jobs." *Murphy*, 527 U.S. at 524. The employer did not regard Mr. Murphy as disabled, but simply unable to attain a DOT license. *Id.*

The district court's conclusion, endorsed by Petitioner, that Ms. Williams' *ability* to do a single job "irretrievably contradicted" her claim that she was substantially limited in working is worlds apart from the position adopted by the EEOC and this Court that the *inability* to do a single job is insufficient to show substantial limitation. The ability to do any job cannot strip a plaintiff of ADA coverage and still honor the text of the ADA, which requires "substantial limitation," not total inability.

III. THE DISTRICT COURT MISAPPLIED THE STANDARDS FOR SUMMARY JUDGMENT.

Confusion over the proper subjects of inquiry for courts making disability determinations has led many lower courts, including the district court here, to impose erroneous evidentiary standards and to usurp the responsibility of juries to make factual inferences. As exemplified in this case, courts increasingly, and too often, resolve disability cases at the summary judgment stage, depriving ADA plaintiffs of a

proper and complete factfinding process, and, ultimately for many, of the remedy that they deserve.[27]

Two critical errors highlight why the district court's decision granting summary judgment was wrong. First, the district court rejected the report of Ms. Williams' vocational expert, Dr. William Weikel, on overly technical grounds and based on findings inconsistent with the applicable EEOC regulations. Second, the district court refused to recognize that evidence detailing the actual limitations on the types of things that an individual can do with his or her hands and arms – here, *inter alia*, a ban on repetitive work, lifting, or work requiring arms above head – may properly support a factfinder's inference that the individual is substantially limited in a major life activity.

The district court rejected the expert's report because, in its view, the report failed to contain all of the elements listed in the EEOC regulations as factors that may indicate a substantial limitation in working.[28] The court thereby erroneously translated the list of factors that the EEOC regulations state "*may*" be considered, 29 C.F.R. § 1630.2(j)(3)(ii) (emphasis added). into a *mandatory* checklist. A plaintiff's failure to come forward with

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[27] Some circuit courts are reversing the trend in the district courts to rule on the existence of a "disability" as a matter of law at the summary judgment stage. *See, e.g., Mullins v. Crowell*, 228 F.3d 1305 nn. 18, 21 (11th Cir. 2000); *Webb v. Garelick Manufacturing Co.*, 94 F.3d 484, 487-488 (8th Cir. 1996); *Katz v. City Metal Co., Inc.*, 87 F.3d 26, 32 (1st Cir. 1996). *See also Arlene B. Mayerson, Restoring Regard for the "Regarded As" Prong, supra* note [ ], at n. 98.

[28] *See* Pet. App. 39a-40a.

evidence that "may" be considered does not warrant summary judgment in the defendant's favor.[29]

Furthermore, the regulations speak in terms of factors that should or may be "considered." 29 C.F.R. § 1630.2(j)(2) & (3)(ii). The district court did not assert that these factors were not considered by the expert in preparing his report. Federal law does not require that an expert report recite each bit of statistical evidence on which it is based. Most fundamentally, even if a report such as this could have been more detailed, a trier of fact nonetheless could reasonably infer from it that Williams' impairment precluded her from holding a large number of jobs. If Toyota believed that a more sophisticated report would have indicated otherwise, the company's responsibility was to adduce such evidence itself.

Even without the benefit of an expert report, a key issue in Ms. Williams' case is whether a trier of fact could reasonably infer from the basic evidence of her physical impairment that Ms. Williams would be restricted in her ability to work. Any trier of fact familiar with the functions of human hands and arms, as well as with the job market in the Louisville area – knowledge presumptively common among jurors in the Central District of Kentucky – could accurately evaluate the practical significance of Williams' impairments, regardless of whether Ms. Williams supplied a report that referenced every one of the suggested considerations cited in the EEOC guidance. Ms. Williams' case is not one where the impairment at issue is one which

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[29] In the preamble to the final ADA regulations, the EEOC emphasized that it had made a specific change from the proposed regulations in order to clarify "that the factors are *relevant to*, but are *not required elements* of, a showing of substantial limitation in working." 56 Fed. Reg. 35,726, 35,728 (1991) (emphasis added).

laymen might not readily understand, such as an esoteric neurological problem, or one in which an individual had a specialized career unfamiliar to most jurors. The district court's *per se* rule that the impairment and the restrictions it causes can *never* support an inference of "substantial limitation" was error. In the context of Ms. Williams' particular case, if Toyota thought that more detailed evidence might be probative and exculpatory on the substantial limitation issue, the company would be free to offer it at trial.

Both in refusing to accord to the jury its proper role in making evidentiary inferences and by imposing extraordinary and erroneous burdens on expert evidence, the district court transgressed the legal standards set forth by this Court in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000). In *Reeves*, the Court took a strong stand against lower courts' imposing additional burdens on plaintiffs seeking remedy for discrimination, emphasizing the proper inferences that a factfinder may make regarding key elements in discrimination cases. *See id.* at 148.

Surviving summary judgment requires only that the nonmoving party have raised a "genuine issue [of] material fact." Fed R. Civ. P. 56(c). Thus, on the issue of whether a plaintiff is "disabled," the standard for denial of summary judgment is not whether the evidence proferred to show disability is conclusive or perfect, but whether it would reasonably support an inference that the plaintiff is disabled. The district court here failed to apply that standard properly.

CONCLUSION

For all the foregoing reasons, this Court should affirm the judgment below.

Respectfully submitted,

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IN THE

Supreme Court of the United States

TOYOTA MOTOR MANUFACTURING, KENTUCKY, INC.,

Petitioner,

v.

ELLA WILLIAMS,

Respondent.

On Writ Of Certiorari to the United States Court Of Appeals for the Sixth Circuit

AMICUS CURIAE BRIEF OF THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA IN SUPPORT OF THE RESPONDENT

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Taylor v. Phoenixville School Dist., 184 F.3d 296(3d Cir. 1999) 14

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29 C.F.R. § 1630.2(j)(3)(i) 5

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Other Authorities

American Bar Association, "Study Finds Employers Win Most ADA Title I Judicial and Administrative

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Peter D. Blanck & Mollie W. Marti, *Attitudes, Behavior and the Employment Provisions of the Americans with Disabilities Act*, 42 Vill. L. Rev. 345 (1997).....15
Peter David Blanck, Communicating the Americans with Disabilities Act: Transcending Compliance--A Case Report of Sears Roebuck and Co. (Report, The Annenberg Washington Program, 1994). 15
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Equal Employment Opportunity Commission, Compliance Manual § 902, Definition of the Term "Disability" (CCH 1995). 7
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AMICUS CURIAE BRIEF OF THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA IN SUPPORT OF THE PETITIONER

IDENTITY AND INTEREST OF *AMICUS CURIAE*

The Association of Trial Lawyers of America ("ATLA") respectfully submits this brief as amicus curiae in this case. Letters from Petitioner and Respondent granting consent to the filing of this *amicus curiae* brief have been filed with this Court.[1]

[1] Pursuant to Rule 37.6, Amicus discloses that no counsel for a party authored any part of this brief, nor did any person or entity other than Amicus Curiae, its members, or its counsel make a monetary contribution to the preparation or submission of this brief.

ATLA is a voluntary national bar association whose approximately 50,000 trial lawyer members primarily represent individual plaintiffs in civil actions, including workers seeking to vindicate their rights under federal civil rights statutes against employment discrimination.

ATLA's mission to preserve the constitutional right to trial by jury reflects its conviction that the most effective means for enforcing individual civil rights is to safeguard the individual's right to present his or her case to a jury – ordinary Americans entrusted with the responsibility to act as finder of fact and conscience of the community. ATLA is deeply concerned that improper use of summary judgment to take employment discrimination cases away from civil juries, will undermine the protections for workers Congress intended in the Americans with Disabilities Act and other civil rights legislation.

SUMMARY OF THE ARGUMENT

1. Petitioner mischaracterizes the decision of the Sixth Circuit Court of Appeals. The court did not hold that Ella Williams is disabled for purposes of Title 1 of the Americans with Disabilities Act merely because she is unable to perform a single particular job. Rather, the court ruled that she had presented sufficient evidence that her impairment prevented her from doing a substantial number of jobs that might otherwise be open to her based on her training and experience.

Obviously, her inability to perform a single particular job at Toyota's plant prompted Ms. Williams to request accommodation. However, Petitioner's own Statement of the Case indicates that Ms. William's impairment precluded her from working at nearly every assembly line job at the large facility. Toyota asserts that as long as she is capable of working

at one assembly-line job, Ms. Williams is not disabled. This assertion is all the more untenable because the single job Toyota identifies as one that Ms. Williams can perform is the very job she had performed satisfactorily and which Toyota made unavailable to her.

Manual assembly line work is not a single job, but constitutes a class of jobs. Respondent's evidence demonstrated that her impairment prevented her from performing a substantial number of such jobs. The court of appeals correctly ruled that this evidence was sufficient for a jury to find that Ms. Williams was disabled under the ADA.

2. The primary issue before this Court is whether the district court improperly took the issue of Ms. Williams' disability away from the jury by entering summary judgment for Toyota. Recent empirical studies reveal that plaintiffs in civil actions under the ADA lose over 93% of cases at the district court level, raising concerns that the rights Congress put in place are not effectively enforced. Research also suggests that improper use of summary judgment to keep the factual question of whether a plaintiff is disabled is a major factor.

This Court has recently reemphasized that a federal court deciding a motion for summary judgment must examine the evidence in the light most favorable to the non-movant, drawing all inferences in favor of the non-movant and leaving for the jury to assess the weight and credibility of the evidence. The district court in this case violated those limits.

The district court erred disregarding crucial medical evidence proffered by plaintiff on the ground that, in the court's view, statements in the medical report were in conflict with plaintiff's own statements. Resolving such inconsistencies is a matter for the jury.

The district court erred in disregarding plaintiff's medical reports on the ground that the medical experts did not

specify the permanence and long-term impact of her condition. As the court of appeals stated, these were easily inferred from the medical restrictions placed on Ms. Williams by her doctors.

The district court erred in disregarding testimony by plaintiff's vocational expert concerning the availability of jobs accessible to plaintiff. The fact that the expert did not tailor his report to plaintiff's local geographical area was a factor to be considered by the jury, not an essential element of proof.

The district court erred in disregarding the report by plaintiff's vocational expert on the ground that the expert relied on medical reports dated after the alleged refusal of accommodation. Whether the lapse of time would have affected the expert's conclusions affected the weight of the evidence.

3. Toyota urges this Court to limit the protections of the ADA to those who are members of a "discrete and insular minority" who are "truly disabled." This cynical argument attempts to pit categories of claimants against each other in a competition for resources and offends the objective of the ADA to remove stereotypes and categories of the disabled. Toyota ignores research that demonstrates that employers who accommodate disabled persons experience cost savings that outweigh the initial expenditures. Congress made the policy decision to require employers to make reasonable accommodations to reduce the economic waste that resulted from consigning the disabled to nonproductivity and dependence. Petitioner has come to the wrong branch of government in its effort to reverse that course.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY HELD THAT PLAINTIFF'S EVIDENCE WAS SUFFICIENT FOR A JURY TO FIND SHE WAS DISABLED FROM A BROAD RANGE OR CLASS OF JOBS

Toyota is somewhat disingenuous in its insistence that the Sixth Circuit below ruled that plaintiff was disabled "based solely on the inability to perform the manual tasks associated with a single, particular job." Pet. Br. at 4. Toyota makes this characterization the major premise of its Question Presented and its Argument to this Court.

This Court has already held that under the Americans with Disabilities Act "to be regarded as substantially limited in the major life activity of working, one must be regarded as precluded from more than a particular job." *Murphy v. United Parcel Serv., Inc., 527 U.S. 516, 523 (1999).* Rather, the claimant must show that his or her impairment precludes working at "a substantial class of jobs" or "a broad range of jobs" utilizing the individual's skills. *Sutton v. United Airlines, Inc.,* 527 U.S. 471, 492-93 (1999). The Court's language reflects the EEOC's regulations. *See* 29 C.F.R. § 1630.2(j)(3)(i) (an individual is "substantially limited" from working if she is "significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.")

The court of appeals' decision in this case is not to the contrary. The court found that Ms. Williams' physical impairments -- her inability to grip tools, frequently lift more than ten pounds, or repetitively use her arms and hands above shoulder height – prevented her from working at manual assembly line jobs, as well as manual product handling jobs and manual building trade jobs. Pet. at 4a. Ms. Williams' impairment did not simply prevent her from doing a particular job, but precluded her from working at a substantial class of jobs utilizing her skills and experience. Toyota's own Statement of the Case demonstrates that her limitation was substantial.

In 1990, Ms Williams began working in Toyota's Georgetown, Ky. plant , which employs over 7,500 workers, many of whom work on assembly lines. She worked in the paint department and on the assembly line using pneumatic tools, until she developed carpel tunnel syndrome in her wrists and tendinitis in her neck and arms. Pet. Br. at 4.

Toyota asserts that it attempted to accommodate Ms Williams by assigning her various modified duty jobs, with little success. Finally, she was assigned to Quality Control Inspection Operations, which Toyota characterizes as having the "easiest jobs" in the plant. Pet. Br. at 5. She worked in that unit for about three years, rotating between Paint Inspection and Assembly Paint, the two least taxing of the unit's workstations. It is undisputed that her performance was satisfactory. *Id.* Toyota then rotated Ms Williams to another workstation in QCIO, which required gripping of tools and repetitive movement of her upper extremities. She trained and attempted to carry out these new duties for several weeks, until the pain in her arms, hands, shoulders and neck rendered her unable to continue. Pet. Br. at 6. At that point, Ms Williams asked to return to her previous position. *Id.*

It is true that her inability to perform the tasks of her new position prompted Ms. Williams to seek a reasonable accommodation from Toyota. It is also true – and a fair reading of Toyota's Statement of the Case bears this out—that her impairment was so severe that it precluded her from every other job at the Toyota plant that she might otherwise have performed. Toyota has suggested only one assembly line job she could perform -- the very paint inspection job that it made unavailable to her.

The assembly line is a mainstay of American manufacturing, used in a wide variety of industries. Assembly line work is recognized as not a single job, but a class of jobs that vary greatly in their demands on workers. *DePaoli v. Abbott Laboratories,* 140 F.3d 668, 673 (7th Cir.1998); *Kiphart v. Saturn Corp.*, 251 F.3d 573, 584 (6th Cir. 2001); *Loven-Swinbank v. Modern Metal Products Co.*, 2000 WL 28255 at *6 (N.D. Ill. 2000) ("Assembly line work is a recognized type of work in manufacturing plants and may constitute a class of jobs.").

Ms. Williams offered expert testimony that her impairments rendered her unable to perform a substantial number of those jobs. Toyota's argument instead focuses on whether there exists any assembly line job she *can* do. Pet. Br. at 7. This is a far narrower interpretation than the ADA's definition of disability. *See Bragdon v. Abbott,* 524 U.S. 624 (1998) ("The Act addresses substantial limitations on major life activities, not utter inabilities.").[2]

II. THE DISTRICT COURT ERRED IN ENTERING SUMMARY JUDGMENT FOR DEFENDANT ON THE ISSUE OF WHETHER PLAINTIFF WAS DISABLED UNDER THE AMERICANS WITH DISABILITIES ACT.

ATLA submits that the central question before this Court is not whether Ella Williams is disabled under the Americans with Disabilities Act. Rather it is whether the

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2 EEOC regulations do not provide a precise definition of a "class" of jobs. However, the Commission' Compliance Manual offers an example. A computer programmer who develops a vision impairment that prevents her from distinguishing characters on computer screens is disabled "because her impairment prevents her from working in the class of jobs requiring use of a computer." By contrast, if her vision impairment only prevented her from distinguishing characters on her employer's peculiar type of computer screens, she is not substantially limited in working if she remains able to perform similar jobs for other employers. Equal Employment Opportunity Commission, Compliance Manual § 902, Definition of the Term "Disability" (CCH 1995). In this case, Ms. Williams' impairment was not limited to the sponge tool Toyota required her to use; she was limited in her ability to grasp tools of any kind.

district court, as the Sixth Circuit found, improperly took this question away from the jury.

Contrary to the hopes of many of the ADA's supporters, civil actions to enforce the right to reasonable accommodations in employment have not proven wholly effective. The number of lawsuits has been relatively small. More significantly, recent empirical studies reveal that defendants prevail in about 93% of cases decided at the trial level. Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants,* 34 Harv. C.R.-C.L. Rev. 99, 100 (1999); American Bar Association, "Study Finds Employers Win Most ADA Title I Judicial and Administrative Complaints," 22 Mental & Physical Disability L. Rep. 403, 404 (1998) (reporting results of study by the ABA Commission on Mental and Physical Disability Law). Only prisoner lawsuits fare as poorly for plaintiffs. Coker, *supra* at 100.

A major factor in the high rate of claimants' losses under the ADA, according to one researcher, is "abuse of the summary judgment device." Colker, *supra* at 101. In particular, "district courts are refusing to send 'normative' factual questions to the jury, such as issues of whether an individual has a 'disability.'" *Id.*[3]

To ensure full judicial enforcement of the rights Congress conferred in the ADA, as well as to preserve the right to trial by jury guaranteed in the Seventh Amendment, this Court should carefully scrutinize the use of summary judgment in cases such as this one.

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3 Another scholar does not disagree with the role played by improper summary judgments, but adds that trial lawyers who do not adequately prepare ADA cases must share some of the blame for this high failure rate. Jeffrey A. Van Detta and Dr. Dan R. Gallipeau, *Judges and Juries: Why Are So Many ADA Plaintiffs Losing Summary Judgment Motions, and Would They Fare Better Before a Jury? A Response to Professor Colker,* 19 Rev. Litig. 505 (2000).

The factual question in this case is clearly defined. The ADA prohibits job discrimination against a qualified person with a disability, which Congress has defined as "a physical or mental impairment that substantially limits one or more of the major life activities" of that individual." 42 U.S.C. § 12102(2)(A). It is undisputed that Ms. Williams suffered an impairment during the relevant time. Pet. at 34a. It is also agreed that performing manual tasks and working are major life activities. *See* 29 C.F.R. § 1630.2(i). At issue is whether the limitations for Williams on these major life activities is "in fact substantial." *Albertson's, Inc. v. Kirkingburg,* 527 U.S. 555, 565 (1999).

> Credibility determinations, the weighing of the evidence, and the drawing of inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor.

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986).

This Court recently had occasion to reemphasize those principles in *Reeves v. Sanderson Plumbing Products, Inc.*, 120 S. Ct. 2097, 2110 (2000), reversing summary judgment in an employment discrimination case where the court failed to draw all reasonable inferences in favor of the plaintiff, disregarded critical evidence in plaintiff's case, and "impermissibly substituted its judgment concerning the weight of the evidence for the jury's." *Id.* at 2111. The district court in this erred in similar fashion.

A. The District Court Erred in Entering Summary Judgment Based on Apparent Inconsistency Between Plaintiff's Testimony and Medical Reports.

Williams presented evidence that she was restricted by both Toyota's doctors and her personal physician from performing manual tasks that require repetitive movement of

her upper extremities or any work that must be performed above her chest level. She was also precluded from any manual task that requires rotary or lateral movements of her head and neck. Pet. at 36a

The district court acknowledged that this medical evidence tended to show that Plaintiff was unable to perform manual tasks. However, the court found this evidence "irretrievably contradicted by Plaintiff's continual insistence that she could perform the tasks in assembly and paint inspection without difficulty; positions requiring manual tasks." Pet. at 36a

Whether any apparent inconsistencies between Ms. Williams' testimony and the doctors' reports undermined the weight or credibility of plaintiff's evidence was a matter for the jury to decide. Certainly, Ms. Williams was entitled to explain to the jury how she could be able to perform one particular job, though she was unable to perform a substantial number of assembly line jobs. *Cf. Cleveland v. Policy Management Sys. Corp.*, 119 S. Ct. 1597, 1604 (1999) (ADA plaintiff was entitled to explain to the jury inconsistencies in pleadings regarding the extent of her claimed disability).

B. The District Court Erred in Failing to Draw Reasonable Inferences from the Medical Evidence Most Favorably To Plaintiff.

Williams presented medical evidence that she is limited in her ability to perform manual tasks, both job-related and in her personal life. As noted above, she presented evidence that she was restricted by both Toyota's doctors and her personal physician from performing manual tasks that require repetitive movement of her upper extremities or any work that must be performed above her chest level. She is also precluded from any manual task that

requires rotary or lateral movements of her head and neck. Pet. at 36a

The district court ruled, however, that Williams "failed to present any evidence regarding the nature and severity of Plaintiff's impairment, the duration or expected duration of her impairment or the permanent or long term impact resulting from the impairment. *See id.*, 1630.2(j)(2). Absent such evidence, no rational juror could conclude that Williams is substantially limited in her ability to perform manual tasks." Pet. at 36a.

As the court of appeals correctly pointed out, "looking at all of the evidence most favorably to the plaintiff, the duration of Williams' impairment, as well as the expected permanent impact of it, are inferable from the permanent work restrictions prescribed by Williams's treating physicians." Pet. at 4a-5a. The district court erred in failing to draw this inference.[4]

C. The District Court Erred in Basing Summary Judgment on the Failure of Plaintiff's Vocational Expert to Include Evidence of Job Availability in Plaintiff's Geographical Area.

Plaintiff offered the testimony of Dr. Weikel, a vocational expert from Morehead, Kentucky, whose report stated that plaintiff's condition reduced the number of jobs in the economy she could perform by 50-55%. Pet. at 38a.

The district court, relying on EEOC regulations set forth at 29 C.F.R. § 1630.2(j)(3)(ii),[5] ruled it essential that

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4 As the district court itself determined, by the time of her termination in Jan. 1997, Ms. Williams' condition had worsened to the point that she was permanently unable to perform work of any kind. Pet. at 48a. The severity, duration, and long-term impact of Ms Williams' impairment were tragically obvious.

5 (3) With respect to the major life activity of working--

such evidence establish "a claimant's ability, or inability, to access the job market *in her own geographical area*." Pet. at 40a (emphasis in original). Because Dr. Weikel's report did not indicate the number and types of jobs unavailable to Ms. Williams in her own geographical area, the court concluded that she could not show she was substantially limited in the activity of working. Pet. at 40a.

The EEOC regulations themselves explicitly state that the enumerated factors with respect to plaintiff's geographical area "may be considered in determining whether an individual is substantially limited in the major life activity of 'working'."

The interpretative guidance offered by the EEOC further states that the enumerated factors,

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(i) The term substantially limits means significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.

(ii) In addition to the factors listed in paragraph (j)(2) of this section, the following factors may be considered in determining whether an individual is substantially limited in the major life activity of "working":

(A) The geographical area to which the individual has reasonable access;

(B) The job from which the individual has been disqualified because of an impairment, and the number and types of jobs utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (class of jobs); and/or

(C) The job from which the individual has been disqualified because of an impairment, and the number and types of other jobs not utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (broad range of jobs in various classes).

29 C.F.R. § 1630.2(j)(3)(ii)

are not intended to require an onerous evidentiary showing. Rather, the terms only require the presentation of evidence of general employment demographics and/or of recognized occupational classifications that indicate the approximate number of jobs (e.g. 'few,' 'many,' 'most') from which an individual would be excluded because of an impairment.

29 C.F.R. Pt. 1630, App. § 1630.2(j).

Whether conditions in the local job market would have undermined the expert's conclusions was a matter to be presented to the jury. *See EEOC v. Rockwell Int'l Corp.*, 243 F.3d 1012, 1017 (7th Cir. 2001) (declining "to create a per se rule that a plaintiff cannot prevail without quantitative evidence of the precise characteristics of the local job market).

D. The District Court Erred in Basing Summary Judgment on the Credibility of Testimony by Plaintiff's Vocational Expert.

Additionally, the district court deemed Dr. Weikel's report "insufficient" because two of the medical records he relied on were dated Feb. 19 and July 15, 1997, some months after Toyota's alleged refusal of reasonable accommodation in Fall, 1996. Pet. at 39a.

A requirement that the vocational expert rely only on medical records dated on or near the exact date of the alleged discrimination is unreasonably narrow and rigid. Whether the plaintiff's condition changed during that period of time and whether that change would have altered Dr. Weikel's opinion as to whether a substantial number of jobs was unavailable to her were matters easily explored on cross-examination. The weight to be accorded to Dr. Weikel's testimony was a matter for the jury, not for the judge on motion for summary judgment. *See, e.g. Taylor v. Phoenixville School Dist.*, 184 F.3d 296, 309 (3d Cir. 1999) (matter for jury to determine

(matter for jury to determine whether medical report reflected claimant's condition on a later date).

III. THIS COURT SHOULD REJECT PETITIONER'S INVITATION TO LIMIT THE ADA TO A "DISCRETE AND INSULAR MINORITY" WHO ARE "TRULY DISABLED."

Toyota expends considerable effort urging this Court to shrink the number of Americans covered by the ADA even beyond the statutory definition of "disabled." It rejects the notion that "to be faithful to the remedial purpose of the Act, we should give it a generous, rather than a miserly, construction." *Sutton v. United Airlines, Inc.*, 527 U.S. 471, 495 (1999) (Stevens, J., dissenting). Instead, Toyota would deny the Act's protections to workers suffering an impairment who cannot also demonstrate that they have been "isolated and segregated" into a "politically powerless," "discrete and insular minority." Pet. Br. at 23. To allow lesser claimants such as Ms. Williams to obtain reasonable accommodation, Toyota argues, would "siphon off the resources employers can devote to assisting the truly disabled." Pet. Br. at 30.

This cynical argument attempts to pit "workers suffering from lesser afflictions" against the "truly disabled" in a competition for resources. Such an approach does violence to the objective of the ADA, to eliminate treatment of the disabled based on stereotypes and categories of impairments, in favor of decisions based on each individual's limitations and qualifications. *See Sutton*, supra at 489; *Kirkingburg, supra* at 567 (the Act requires claimants to prove "the extent of the limitation in terms of their own experience."); 29 CFR pt. 1630, App. § 1630.2(j) ("The determination of whether an individual has a disability is not necessarily based on the name or diagnosis of the impairment the person has, but rather on the effect of that impairment on

the life of the individual"); *see also Bragdon v. Abbott*, 524 U.S. 624 (1998) (declining to consider whether HIV infection is a *per se* disability under the ADA).

Nor does Toyota offer a shred of support for its zero-sum theory of a race for resources. Studies of large employers such as studies by the Job Accommodation Network and self-studies by corporations such as Sears, Roebuck & Co., found that the average direct cost of workplace accommodations for various groups of disabled workers ranged between $45 and $500, but resulted in an average per-accommodated-employee savings of more than $5,000 in lower job training costs, rehabilitation expenses, and insurance claims combined with increased employee productivity. *See* Peter D. Blanck & Mollie W. Marti, *Attitudes, Behavior and the Employment Provisions of the Americans with Disabilities Act*, 42 Vill. L. Rev. 345, 375-78 (1997); Peter David Blanck, *Communicating the Americans with Disabilities Act: Transcending Compliance--A Case Report of Sears Roebuck and Co.* (Report, The Annenberg Washington Program, 1994).

Congress, of course, was not unaware of employers' fears concerning the costs of accommodating the disabled. However, Congress also found that failure to make reasonable accommodations "costs the United States billions of dollars in unnecessary expenses from dependency and nonproductivity" 42 U.S.C. § 12101(a)(9); see also S. Rep. No. 116, 101st Cong., 1st Sess. 16-17 (1989) ("The Committee also heard testimony and reviewed reports concluding that discrimination results in dependency on social welfare programs that cost the taxpayers unnecessary billions of dollars each year.").

Congress made an economic policy judgment that requiring employers to make reasonable accommodations for qualified persons with disabilities was a rational step toward reducing this irrational economic waste. Toyota clearly

disagrees with the wisdom of that policy. However, it has come to the wrong branch of government to rewrite the law.

CONCLUSION

For the above reasons, the decision of the court of appeals should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

TOYOTA MOTOR MANUFACTURING, KENTUCKY, INC.,
Petitioner,

v.

ELLA WILLIAMS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF THE RESPONDENT

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), a federation of 66 national and international unions representing approximately 13 million working men and women, files this brief *amicus curiae* with the consent of the parties as provided for in the Rules of this Court.[1]

SUMMARY OF ARGUMENT

In this case, the Court of Appeals concluded that "taking the evidence in the light most favorable to the plaintiff [Ella Williams] . . . the plaintiff's set of impairments to her arms, shoulders and neck are sufficiently disabling to allow the fact finder to find she crosses the threshold into the protected class of individuals under the ADA who must be accorded reasonable accommodation." Pet. App. 4a. In so doing the court below stated that Ms. Williams was substantially limited in performing manual tasks—not only "manual tasks associated with working," but also "manual tasks associated with recreation, household chores and living generally." *Id.* 6a.

According to the Petitioner, the theory of the Court of Appeals' disability ruling is that "Williams's inability to perform the particular manual tasks associated with her specific job, without more, demonstrate[d] that she [was] 'substantially limited' in the major life activity of performing manual tasks." Pet. Br. 11-12. That theory is erroneous, says Petitioner, in that it makes the inability to do the particular manual tasks of a specific job the hallmark of inability to perform manual tasks as a major life activity. *Id.*

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[1] No counsel for a party authored this brief *amicus curiae* in whole or in part, and no person or entity, other than the *amicus curiae*, made a monetary contribution to the preparation or submission of this brief.

This attack on the Court of Appeals' ruling is doubly flawed.

First, it fundamentally mischaracterizes the Court of Appeals' decision, which does not conflate the inability to do a particular manual task job and inability to do manual tasks more generally.

Second, the Petitioner's basis for so collapsing the Court of Appeals' disability ruling is the following erroneous proposition: the physical impairments of carpal tunnel syndrome/tendinitis substantially limit the impaired person's ability to perform certain manual tasks that are solely and particularly associated with working and do not limit the impaired person's ability to perform a range of tasks associated with "recreation, household chores and living generally." The scientific literature on the nature of carpal tunnel syndrome/tendinitis, and the literature, as well as the testimony by individuals with these impairments, on the nature of that impairment's functional effects, refute that proposition.

ARGUMENT

Ella Williams—who was diagnosed with bilateral carpal tunnel syndrome and bilateral tendinitis in her hands, wrists, arms, neck and shoulders—sought a work assignment accommodation from her employer, Toyota Motor Manufacturing, Kentucky, Inc. ("Toyota") in the following form: reassignment from a Quality Control Inspection Operations position that entailed physically demanding manual tasks, back to her former Quality Control Inspection Operations position, which imposed other performance demands but not the performance of such manual tasks. Pet. App. 25a-28a. Toyota did not provide Ms. Williams the requested accommodation.

Ms. Williams brought suit under the Americans with Disabilities Act contending, *inter alia*, that Toyota had failed to reasonably accommodate her disability as required by the

ADA. The District Court granted summary judgment in Toyota's favor on the ground that Ms. Williams' carpal tunnel syndrome/tendinitis was not a "disability" within the ADA's meaning of that term. Pet. App. 42a. The Court of Appeals reversed the District Court's grant of summary judgment to Toyota and remanded for further proceedings on Ms. Williams' ADA claim. Pet. App. 6a-7a.

In reversing the District Court, the Court of Appeals concluded that "taking the evidence in the light most favorable to the plaintiff [Ms. Williams], . . .the plaintiff's set of impairments to her arms, shoulders and neck are sufficiently disabling to allow the fact finder to find she crosses the threshold into the protected class of individuals under the ADA who must be accorded reasonable accommodation." Pet. App. 4a. These impairments were "sufficiently severe" to make Ms. Williams' arms and hands "like deformed limbs," and rendered "Williams '[s]ignificantly restricted as to the condition, manner or duration under which [she] can perform [manual tasks] as compared to the condition, manner, or duration under which the average person in the general population can perform [them].'" *Id.* 6a (quoting 29 C.F.R. § 1630.2(j)(1)(ii)) (bracketed language by the Court). That being so, Ms. Williams was substantially limited in performing manual tasks—not only "manual tasks associated with working," but also "manual tasks associated with recreation, household chores and living generally." *Id.*[2] Having "conclude[d] that Williams is substantially limited in performing manual tasks," the Court of Appeals expressly

[2] Toyota emphasizes a sentence in the Sixth Circuit's opinion that acknowledges that Williams "can perform a range of isolated, non-repetitive manual tasks performed over a short period of time [involving] personal or household chores." Pet. App. 4a. Toyota would read that sentence to say that Ms. Williams can as a general matter perform non-work-related manual tasks. Pet. Br. 16-18. But that plainly is *not* what the Court of Appeals was saying, as is evident from the subsequent passages in the opinion quoted in text.

declined to consider the separate questions of "whether Williams is substantially limited as to the major life activities of lifting or working." *Id.* 5a.

According to Toyota, the theory of the Court of Appeals' disability ruling is that "Williams's inability to perform the particular manual tasks associated with her specific job, without more, demonstrate[d] that she [was] 'substantially limit[ed]' in the major life activity of performing manual tasks." Pet. Br. 11-12. That theory is erroneous, says Toyota, in that it makes the inability to do the particular manual tasks of a specific job the hallmark of inability to perform manual tasks as a major life activity. *Id.* This attack on the Court of Appeals' ruling is doubly flawed.

First of all, Toyota fundamentally mischaracterizes the Court of Appeals' decision. What the court below ruled was that Ms. Williams' set of impairments—bilateral carpal tunnel syndrome and bilateral tendinitis of the hands, wrists, arms, neck and shoulders—which were "sufficiently severe" to make Ms. Williams' arms and hands "like deformed limbs," and which limited her ability to perform the manual tasks associated with her Toyota job, were a set of impairments that as a general matter limited her ability to perform the manual tasks associated "with recreation, household chores and living generally," *viz*, with the major life activity of performing manual tasks. Given the nature of those impairments, the nature of their functional effect on a person's ability to use her arms and hands to perform manual tasks, and the nature of the range of manual tasks associated with recreation, household chores, and living generally, that ruling is entirely sound.

Second, insofar as Toyota goes beyond arguing that the Court of Appeals' disability ruling is contrary to the evidence on Ms. Williams' ability to perform a range of manual tasks, Toyota's basis for collapsing that ruling into one that equates inability to do a particular manual task job with inability to do

manual tasks more generally is the following erroneous proposition: the physical impairments of carpal tunnel syndrome/tendinitis substantially limit the impaired person's ability to perform certain manual tasks that are solely and particularly associated with working and do not limit the impaired person's ability to perform a range of tasks associated with "recreation, household chores and living generally." As we show in the argument that follows, the scientific literature on the nature of carpal tunnel syndrome/tendinitis and on the nature of its functional effects refutes that proposition.

1. So far as relevant here, the ADA defines "disability" as "a physical or mental impairment that substantially limits one or more of the major life activities of such individual." 42 U.S.C. § 12102(2). The Equal Employment Opportunity Commission (EEOC) has adopted comprehensive regulations that "provide additional guidance regarding the proper interpretation of th[e statutory] term [disability.]" *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 479 (1999).

According to the EEOC's regulations, "major life activities" are "those basic activities that the average person in the general population can perform with little or no difficulty." 29 C.F.R. pt. 1630, App. § 1630.2(i). The regulations further elaborate on the meaning of "major life activities" by providing that such activities include "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 29 C.F.R. § 1630.2(i). And, the regulations add that a person is "substantially limited" if he or she is "[u]nable to perform a major life activity that the average person in the general population can perform," or is "[s]ignificantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major

life activity." 29 C.F.R. § 1630.2(j). So, for example, "an individual who, because of an impairment, can only walk for very brief periods of time would be substantially limited in the major life activity of walking." 29 C.F.R. pt. 1630, App. § 1630.2(j).

2. We make physical uses of our shoulders, arms, and hands in performing a range of manual tasks associated with working and a range of manual tasks associated with recreation, household chores, and living generally. Our physical capacities in that regard are affected by a family of disorders known as "musculoskeletal disorders," or MSDs. The MSDs pertinent here are denominated carpal tunnel syndrome and tendinitis of the hands, arms, neck and shoulders.[3]

MSDs are "conditions that involve the nerves, tendons, muscles, and supporting structures of the body." National Institute for Occupational Safety and Health, Musculoskeletal Disorders and Workplace Factors (1997), at x. MSDs are "soft tissue" disorders, as contrasted with "hard tissue" disorders involving the bone and cartilage. David A. Zohn, Musculoskeletal Pain: Diagnosis and Physical Treatment (2nd ed. 1988), at 4. "The soft tissues composing the musculoskeletal system are the muscles and their fascial envelopes, tendons and tendon sheaths, ligaments, joint capsules, and bursae." *Id.* at 3-4. The soft tissues serve several functions, most importantly to "support and move joints." *Id.* at 4. Soft tissues also serve as linings of joints and serve as "'bumpers' to friction over bony prominences." *Id.* The MSDs that involve the upper extremities of the body

[3] Following an exhaustive review of the scientific literature, the National Research Council of the National Academy of Sciences concluded that "musculoskeletal disorders of the low back and upper extremities" are "an important national health problem." National Research Council, Musculoskeletal Disorders and the Workplace: Low Back and Upper Extremities (2001), at 8.

include disorders such as "rotator cuff injuries (lateral and medial), epicondylitis, carpal tunnel syndrome, tendinitis, [and] tenosynovitis of the hand and wrist." National Research Council, Musculoskeletal Disorders and the Workplace: Low Back and Upper Extremities (2001), at 431.

(a). Carpal tunnel syndrome (CTS), a particularly pervasive and serious MSD, is caused by compression of the median nerve at the wrist. Robin Herbert, et al., Clinical Evaluation and Management of Work-Related Carpal Tunnel Syndrome, 37 Am. J. Ind. Med. 62 (2000), at 62.

The mechanism by which median nerve compression occurs can be described as follows. "At the wrist, the median nerve and flexor tendons pass through a common tunnel whose rigid walls are formed by the carpal bones and joints and the transverse carpal ligament (flexor retinaculum)." Robert B. Salter, Textbook of Disorders and Injuries of the Musculoskeletal System (Third ed. 1998). "Because of its tight internal dimensions and full content of nine flexor tendons enclosed in synovial sheaths, the carpal canal offers little tolerance for volume change." Martin Cherniack, "Upper Extremity Disorders," Textbook of Clinical Occupational and Environmental Medicine 376-388 (Linda Rosenstock, et al., eds., 1994), at 381. Thus, "[a]ny disorder that takes up space in this already crowded tunnel compresses the most vulnerable structure, the median nerve, and produces *carpal tunnel syndrome*." Salter, *supra*, at 326 (emphasis in original).

Carpal tunnel syndrome has been a recognized disorder for nearly 150 years. "Median nerve compression at the wrist," now known as carpal tunnel syndrome, was first reported in 1860. J. Steven Moore, Carpal Tunnel Syndrome, 7 Occ. Med. 741 (1992), at 741-2. The term "carpal tunnel syndrome" was first used in the early 1950s, although the disorder was also described as tardy median palsy, partial thenar atrophy, and median neuritis. *Id.* By 1957, however,

"[t]he term carpal tunnel syndrome [was] now used to describe all cases of compression neuropathy of the median nerve at the wrist." *Id.*

The symptoms and effects of carpal tunnel syndrome are well documented. Carpal tunnel syndrome is identified by "a characteristic pattern of pain, paresthesias, and weakness following the distribution of the median nerve distal to the transcarpal ligament in the wrist." Cherniack, *supra*, at 380-81. Individuals with CTS experience "[s]ymptoms of pain, numbness, tingling, or burning" and may also report "clumsiness of the hand and decreased grip strength." Lisa Mani & Fredric Gerr, Work-Related Upper Extremity Musculoskeletal Disorders, 27 J. Occ. Env. Med. (2000) at 859. In addition, "weakness and atrophy of the thenar [thumb] muscles [may occur] in advanced cases [of CTS]." Herbert, *supra*, at 63.

Carpal tunnel syndrome is diagnosed through "evaluating the medical history, physical findings, and results of electrophysiologic testing." Preventing the Work-Related Carpal Tunnel Syndrome: Physician Reporting and Diagnostic Criteria, 112 Annals of Int. Med. 317 (1990). "[M]ost authorities agree that a combination of clinical symptoms and signs and electrodiagnostic findings is the most valid means of diagnosing carpal tunnel syndrome." Herbert, *supra*, at 63.

(b). Tendinitis, in its turn, is inflammation of the tendons. Sandra Curwin & William D. Stanish, Tendinitis: Its Etiology and Treatment (1984), at 25. Tendons are "ropelike structures that connect muscles to bone." *Id.* at 1. Tendons are essential to the movement of limbs. "The muscles are the prime movers of the body—they contract and produce force. Tendons allow precise application of this force to the limb being moved. . . . [W]hile muscle and tendon are structurally separate, functionally they are one unit—the muscle-tendon unit." *Id.*

"Most tendon injuries fall into the classification known as *overuse syndromes*. . . .The term *overuse* means that the tendon has been loaded repeatedly until it is unable to withstand further loading, at which point damage occurs." Curwin & Stanish, *supra*, at 25 (emphasis in original). "The injured tendon . . . is one with microscopic or macroscopic damage to both its structural units and its blood supply. In this state, the tendon is predisposed to further injury . . ." *Id.* at 31.

Tendon degeneration can play a significant role in the development of tendinitis. Compression of the tendons, which occurs when the arm is elevated, impairs blood circulation which, in turn, accelerates tendon degeneration. Circulation can also be impaired during static contractions of the shoulder muscles. Impairment of circulation causes cell death within the tendon, forming debris in which calcium may deposit. "[E]xertion may trigger an inflammatory response to the debris of dead cells, resulting in an active tendinitis." Mats Hagberg, "Neck and Shoulder Disorders," Textbook of Clinical Occupational and Environmental Medicine 356-364 (Linda Rosenstock, et al., eds., 1994), at 360. Given this biomechanical process, "[i]t is not surprising to find a high risk of shoulder tendon lesions in activities involving static contractions of the supraspinatus muscle or repetitive shoulder forward flexions or abductions." *Id.*

The shoulder is highly susceptible to tendinitis. In particular, the rotator cuff muscles are a common site of tendinitis, as are the biceps muscles. Hagberg, *supra*, at 359. At these locations, the tendons perform large movements as they pass the shoulder joint. *Id.* As the National Institute of Arthritis and Musculoskeletal and Skin Diseases explains, "[t]he shoulder is the most movable joint in the body. However, it is an unstable joint because of the range of motion allowed. It is easily subject to injury because the ball of the upper arm is larger than the shoulder socket that holds it. To remain stable, the shoulder must be anchored by its muscles,

tendons, and ligaments." National Institute of Arthritis and Musculoskeletal and Skin Diseases, Questions and Answers About Shoulder Problems, available at http://www.nih.gov/niams/healthinfo/shoulderprobs/shoulderqa.htm.

Shoulder tendinitis has been described as having three stages. "Stage I is characterized by edema and hemorrhage, often seen acutely after excessive tendon stress during overhead use of the arm in sports or work. In stage II, fibrosis and tendinitis result in repeated episodes of mechanical inflammation. Bone spurs and tendon rupture are evidence of a stage III impingement lesion." Hagberg, *supra*, at 360. Moreover, "[a] history of shoulder tendinitis (stages I or II) makes a worker doing repetitive or overhead work susceptible to a relapse of tendinitis." *Id.* at 361.

Tendinitis of the arms and hands is accompanied by tenderness, swelling, warmth, and, on occasion, redness. Mani & Gerr, *supra*, at 857. Individuals with rotator cuff tendinitis typically experience weakness, pain, and tenderness, and may have limited ranges of shoulder movement as well. *Id.* at 852.

(c). The scientific literature demonstrates that MSDs—including carpal tunnel syndrome and tendinitis—can and do impair the ability of individuals to perform the range of physical tasks associated with daily living.

A group of researchers conducted a survey of 575 Maryland individuals with MSDs, including carpal tunnel syndrome, tendinitis of the arm, wrist, shoulder or rotator cuff, and other disorders. Half of the respondents reported that their MSDs had a continuing adverse effect on their ability to perform normal manual tasks. Respondents reported that "the impact of [their] symptoms was felt more at home than on the job." James Keogh, et al., The Impact of Occupational Injury on Injured Worker and Family: Outcomes of Upper

Extremity Cumulative Trauma Disorders in Maryland Workers, available at the OSHA Docket Office, Docket No. S-777, Exhibit 30-651-1.

These researchers found a high percentage of respondents reporting that their disorders interfered with their ability to perform a variety of basic, simple tasks. For example, individuals with MSDs reported difficulty with activities involving arm and shoulder strength and coordination, such as pushing open a window (49%) or pushing up from an armchair (43%). Respondents also had difficulty with activities requiring grip strength and coordination, such as writing with a pen (49%) and pouring from a container into a glass (43%). Myriad other basic and simple tasks posed difficulties for people with MSDs: pulling open a door, carrying a small bag of groceries, holding an umbrella, turning a doorknob, holding a phone to the ear, turning a key, picking up a coin, lifting a child over a crib rail, lowering oneself into a bathtub, mopping floors, cooking at a stove top, scratching the back, and putting items on a high shelf. Individuals with carpal tunnel syndrome were more likely to report such difficulties than people with other MSDs. Keough, *et al.*, *supra* at 8-9, 20.

Another study surveyed Connecticut individuals with MSDs, including carpal tunnel syndrome and tendinitis. Timothy F. Morse, et al., The Economic and Social Consequences of Work-related Musculoskeletal Disorders: The Connecticut Upper-extremity Surveillance Project (CUSP), 4 Int. J. Occup. Environ. Health 209 (1998). Nearly half of the respondents reported that they had to cut back on activities at home because of their disability. *Id.* at 212. This cohort was far more likely to report difficulty performing various tasks of daily living as compared to a control group. Specifically, individuals with MSDs were much more likely to report difficulty with basic tasks such as child care, bathing, writing, gripping, household chores, opening jars, carrying bags, brushing hair and/or teeth, and driving. *Id.* at 212-13.

Dr. Robin Herbert, an expert in MSDs, recently reported on the preliminary results of a an additional pilot study involving individuals who used computers on their jobs who had MSDs, including hand/wrist tendinitis and carpal tunnel syndrome. Robin Herbert, M.D., Testimony on the Need for a National OSHA Ergonomics Program Rule, before the Occupational Safety and Health Administration (March 2, 2000), available at the OSHA Docket Office, Docket No. S-777. Again, high percentages of these individuals reported significant impairment in their ability to perform a variety of manual tasks. For example, 49 percent reported moderate to severe difficulty in writing; 53 percent of respondents reported moderate to severe difficulty opening jars; and 54 percent reported moderate to severe difficulty doing household chores.

The findings of these studies are borne out by the testimony of individual workers at recent rulemaking hearings before the federal Occupational Safety and Health Administration (OSHA).[4]

Jan Garrett, a poultry worker at a poultry processing plant in Roberts, Kentucky, contracted carpal tunnel syndrome while working in the "final trims" department at her plant, where her job involved cutting off various parts of chickens as they passed her on the line. She described the impact of her impairment as follows:

> My hands would go numb, tingle, and ache deep down.
>
> At home I have trouble cutting vegetables, peeling, slicing, chopping. I haven't been able to cut a head of lettuce . . . because I just cannot put the pressure on it with a knife.

---

[4] An ergonomics program standard was promulgated by OSHA after an intensive rulemaking process. 65 Fed. Reg. 68261 (Nov. 14, 2000). The standard was however disapproved under the Congressional Review Act. P.L. 107-5, March 20, 2001. The record from the OSHA rulemaking is available at the OSHA Docket Office, and the transcripts from the informal rulemaking hearings are available on the Internet.

> I've had a lot of trouble around Christmas where you do all your cookies and all like that because I can't do all the stirring and mixing that you need to do.
>
> Cleaning is a big problem because of trying to grip the handles of the vacuum cleaner, mops, and such. And just using a spray bottle is just a killer. I mean you just can't do it.
>
> Laundry, I have problems getting clothes out of the washer because you have to grab them and pull them out and everything. And I hang my laundry out a lot, as much as I can. But my husband and son have to help me do that because you can't hold onto the clothespin very long.
>
> We bought us a home last summer and my husband and sister did most of the cleaning before we moved in because I can't do it.
>
> I still haven't been able to wash my windows yet.
>
> I have cramps in my hands and wrists if I get heavy pots and pans, skillets out of the oven. So I haven't even tried to clean the oven. I get burned a lot because I can't feel the heat 'til I've already blistered my finger tips. [Testimony of Jan Garrett before the Occupational Safety and Health Administration (March 30, 2000), at 6002-06, available at ttp://www.osha-slc.gov/ergonomics-standard/PROPOSED/transcripts/ergo03302000.pdf]

Heidi Eberhardt—a 32-year-old graduate of Dartmouth College who was employed as a writer/researcher on international trade issues by a .com Internet publishing company and who has bilateral tendonitis, tenosynovitis, and DeQuervain's syndrome—described the impact of her impairment in these terms:

> Here are a few simple things that I used to take for granted, but I now have difficulty with: squeezing shampoo bottles, dishwashing detergent, toothpaste tubes, turning on and off faucets, clipping finger and toe nails, driving, shifting gears, holding the steering wheel,

carrying groceries, cooking, carrying heavy pots, opening cans, cutting things, putting away dishes, cutting my food, opening milk carton ends, opening bottles, opening cans, making coffee, holding coffee, getting ice cubes out of the ice tray, moving anything heavy, dressing myself, buttoning pants and shirts, pulling things on, hanging up clothes, doing laundry, carrying clothes to the laundromat, pulling clothes in and out of the washer and dryer, folding clothes, cleaning the house, washing counters, bathrooms, vacuuming, writing letters, grocery lists, writing checks for bills, opening mail, opening doors and windows, turning my house key in the lock or my car key in the ignition, picking up my nephew.

In short, almost anything you need your hands to do, and this list does not include anything I might want to do for fun nor does it include computer or work activities. [Testimony of Heidi Eberhardt before OSHA (April 6, 2000) at 7343-44, available at http://www.osha-slc.gov/ergonomics-standard/PROPOSED/transcripts/ergo04062000.pdf.]

Eberhardt added:

> I would like to get married and have children some day. And I am worried about not being able to physically raise my children. [*Id.* at 7343.]

John Nalenpinski—a 43-year old machine operator who has worked for Briggs and Stratton in Milwaukee, Wisconsin for 24 years and who was diagnosed with bilateral carpal tunnel syndrome—testified about the impact of his injury as follows:

> I had problems sleeping, just working around the house, such as cutting the grass, trimming the bushes.
>
> Because the vibration from the tools made my hands ache real bad. I was always dropping stuff, such as coffee cups, soda, even fly wheels at work.

> The pain started. And it was so intense at night. And in the morning, my fingers were so tight I could hardly move them.
>
> I had a hard time just pulling my pants up or turning the door knob. . . . I still have problems today almost two years later. I have a hard time opening up jars and even getting my gas cap off my truck. . . . I have lost sensitivity in my hands to the point where I cannot tell if the clothes in the dryer are wet or dry. [Testimony of John Nalenpinski before OSHA (April 14, 2000), at 9416-9417, available at http://www.osha-slc.gov/ergonomics-standard/PROPOSED/transcripts/ergo04142000.pdf.]

Eugenia Barbosa, an assembly line worker who was diagnosed with severe damage to her rotator cuff, radial nerve, and wrist, testified:

> My life has completely changed for myself and for my family.
>
> Every day, I must deal with my pain. I am no longer able to work. . . . I am unable to cook and clean for my family. Even comb[ing] my hair and tak[ing] care of my own personal needs is very difficult for me. [Testimony of Eugenia Barbosa before OSHA (April 6, 2000), at 7324-7329, available at http://www.osha-slc.gov/ergo-nomics-standard/PROPOSED/transcripts/ergo04062000.pdf.]

Carol Py, a clerk typist with bilateral carpal tunnel syndrome and other MSDs of her hands and arms, added:

> I have trouble turning the pages. . . .
>
> I have difficulty driving, cleaning, cooking, and food shopping. And my husband, he mostly does all my shopping for me. And my grandchildren do a lot of the cleaning for me, too.
>
> The yard work is out of the question since I cannot rake or mow the lawn. I had to give up the things that I used to love like sewing and gardening. Before I was injured, I even had a green belt in karate.

> My arms are so weak now that I can barely take care of my three grandchildren. [Testimony of Carol Py before OSHA (March 31, 2000), at 6319-6322, available at http://www.osha-slc.gov/ergonomics-standard/PROPOSED/transcripts/ergo03312000.pdf.]

4. The foregoing materials make it plain that individuals with MSDs can be—and that many are—"substantially limited" by their impairment in the "major life activity" of performing manual tasks associated with recreation, household chores and living generally, either because they cannot perform the activity at all, or because they are "significantly restricted as to the condition, manner or duration" that they can perform that activity. 42 U.S.C. § 12102(2); 29 C.F.R. § 1630.2(j).[5] The functional effect of a particular MSD or MSDs on a particular individual's capacities depends on a multitude of factors, including how long the condition existed before it was diagnosed, whether the MSD was properly treated, and whether exposure to the activity causing the MSD has continued.

This Court has made it plain that "whether a person has a disability under the ADA is an individualized inquiry" which is to be "determined based on whether an impairment substantially limits the 'major life activities of such individual.'" *Sutton v. United Air Lines, Inc.*, *supra*, 527 U.S. at 483. In a case like this one where the impairment is carpal tunnel syndrome/tendinitis, the point of that individualized inquiry is to determine whether the impairment's functional effect is to substantially limit the impaired individual's ability to perform manual tasks—both those associated with working and those associated with recreation, household chores, and living generally.

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[5] Even Toyota recognizes that MSDs may qualify as a disability under the ADA. As Toyota notes, "[i]t is not difficult to imagine a case of CTS [carpal tunnel syndrome] so severe that it precludes an individual from performing a broad range of basic manual functions that the average person typically performs without difficulty." Pet. Br. at 18 n.6.

Here, the Sixth Circuit made that "individualized inquiry" and determined that Ms. Williams was substantially limited in the major life activity of performing manual tasks. As we have shown, the Sixth Circuit made that determination by applying the correct legal standard. And, while Toyota claims that the Court of Appeals' determination is not supported in the evidence, this Court does not ordinarily sit to review court of appeals' fact finding. There is no occasion to do so here.

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted,

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